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No. 88-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,
Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR and DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEN P. OLIVER
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Are conveyances of 40,000,000 acres of land to Native corporations under the Alaska Native Claims Settlement Act subject to "valid existing rights" (§14(g)) of private individuals in such lands, or do conveyances confiscate such rights without notice?

2. Should Native corporations be required to convey "without consideration, title to the surface estate in the tract[s] occupied . . . as a primary place of residence" to actual occupants, as directed by Alaska Native Claims Settlement Act §14(c)(1)?

3. Does publication in the Federal Register satisfy the knowledge requirement for accrual of a claim under the Quiet Title Act, 28 U.S.C. §2409a(g)?

PARTIES INVOLVED

In addition to the parties named in the caption, Cook Inlet Region, Inc., was named in the caption of the Amended Opinion below. However, Cook Inlet did not participate in the proceeding in the Ninth Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Therese U. Donnelly, personal representative of the Estate of Joseph F. Donnelly, respectfully petitions this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit to review that court's judgment and amended opinion entered in this proceeding.

OPINIONS BELOW

The Amended Opinion of the Court of Appeals appears as Appendix A and is reported (but with inaccuracy) at 841 F.2d 968. The opinions of the district court appear as Appendices B, C and D. The findings of the district court appear as Appendix E.

JURISDICTION

The Court of Appeals entered judgment on June 27, 1988. Appendix I, page 94a. An order denying a petition for rehearing was entered June 27, 1988, Appendix J, page 96a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

The petition involves the following statutes: Federal Power Act, §24, 16 U.S.C. §818; 28 U.S.C. §2409a; 43 U.S.C. §§2, 161, 164, 1632; Alaska Native Claims Settlement Act §2(b)), 3(e), 11(a), 14(a), 14(c), 14(g), 22(b), 26, 43 U.S.C. §§1601(b), 1602(e), 1610(a), 1613(c), 1613(g), 1621(b); AS (Alaska Statutes) 9.10.230. This petition involves federal regulations: 43 CFR §§2650.3-1(a), 2650.4-1, 2650.5-4, 2650.7, 2651.5.

STATEMENT

Every citizen in Alaska before 1971 was entitled to a homestead patent to 160 acres of public land. 43 U.S.C. §161. In 1958 Joseph F. Donnelly staked such a claim (BLM file 043097; district court exhibit EK-CQ).

In 1952 the Federal Power Commission ("FPC") determined that the land in part of his 160-acre claim would "not be injured" for purposes of power development by location or entry under the public land laws. Appendix M. Section 24 of the Federal Power Act, 16 U.S.C. §818 ("§24 FPA") commanded the Secretary of the Interior, "upon notice of such determination", to "declare such lands open to location, entry, or selection".

The Secretary's disregard and concealment of this statutory duty resulted in denying Donnelly a patent to these 92.5 acres of homestead land granted him by Congress. The balance of his 160 acre claim was admittedly unreserved and the BLM did not dispute that part of his claim.

In 1975 the United States sued Joseph Donnelly in district court, claiming he was in trespass. Donnelly on May 23, 1975 counterclaimed for the same land. In 1979 the United States patented this land, "subject to valid existing rights", Exhibit EK-CO, to a village corporation under the provisions of the Alaska Native Claims Settlement Act ("ANCSA") without prior notice to Donnelly. The district court then dismissed the United States' complaint against Donnelly over Do-

nelly's objection.[1] Donnelly joined the Native corporation (Eklutna, Inc.) as a third party defendant, asking for imposition of a constructive trust on this land. In the alternative Donnelly prayed for enforcement of ANCSA §§14(c), 14(g) and 22(b), demanding that title be quieted in Donnelly and/or that Eklutna be required to issue him a conveyance.

Title 28, U.S.C. §1331 gave the district court jurisdiction of petitioner's claims since they involved the meaning and effect of federal statutes. To the extent that some of petitioner's claims were against the United States, 28 U.S.C. §1346 and §2409a conferred jurisdiction. 28 U.S.C. §1361 provided jurisdiction over federal officers. 5 U.S.C. §702 may provide an alternate basis of jurisdiction.

"Departure from Formal Appeal Process"

The BLM told Donnelly in 1958 that part of his claim was rejected because of a conflict with an alleged power reserve. Donnelly did not file an *immediate* administrative appeal because he was not served with the FPC no-injury determination and was ignorant of the contents of §24FPA. Without such knowledge, he could not know the BLM was withholding the land from him contrary to law. Donnelly and his wife, Therese, in 1958 wrote their Congressman who, in turn, sent on their behalf a letter to the Director of the BLM Director about the matter. Findings, Appendix E, p. 67a. Mrs. Donnelly in 1959 appealed directly to the Secretary of the Interior (not

[1] Civil Rule 41 provides that the complaint *not* be dismissed in such circumstances. Had this rule been followed all the issues herein would have been resolved on the merits. See *Block v. North Dakota*, 461 U.S. 273, 291 (1983).

the *assistant* Secretary) in a letter signed by her and other homesteaders who were similarly affected. They requested an authoritative determination of the status of the lands. Appendix N. The Court of Appeals held this was not an administrative appeal because it began "Dear Sir" rather than with magic words "Formal Administrative Appeal".

The Secretary directed an Assistant Secretary to respond. Appendix O. The Assistant Secretary said to them:

> There has been some confusion over the fact that although the Federal Power Commission had indicated that it was no longer interested in the reserve, the reserve had not been opened to entry. Any misinformation is sincerely regretted but the *fact remains that any settlement of the reserved lands cannot be recognized under existing law.*
>
> You may *rest assured* that we are not going to take any arbitrary action.

Appendix O, p. 70a. Emphasis supplied. Nevertheless the Ninth Circuit concluded that the Donnellys "sat on their rights" in not filing suit immediately thereafter. Amended Opinion, Appendix A, at p. 14a. Any quiescence was the result of a government-administered verbal "drug" in the above letter and in other government representations of like tenor.

Administrative Claim

Donnelly's administrative claim was pending before the BLM until 1964 when the BLM announced its decision as to which specific acreages were outside of the alleged reserve and which were inside. Ap-

pendices G, H. This was within 12 years of Donnelly's counterclaim, filed in 1975. The Court of Appeals disregard of this fact is discussed more fully below, pp. 23-25.

Enactment of ANCSA

Congress legislated in 1971 to settle and satisfy the claims of Alaska Natives to part of the lands in Alaska.[2] The claims were to be satisfied out of land not belonging to homesteaders and other grantees with rights conferred by federal law prior to 1971. ANCSA §§3(e), 11(a), 14(a); "Government Interference with Private Interests in Public Resources", Laitos and Westfall, *Harvard Environmental Law Review*, Vol. 11, p. 1 n.2 (1987) (hereinafter "Laitos and Westfall").

There was and is ample land in Alaska to satisfy Native claims without taking the lands belonging to individuals. This petition is brought because the Ninth Circuit's decision fulfills the Settlement obligations at the expense of persons with fully valid entitlements in Alaska.

Action of Courts Below

The district court said that Donnelly had not exhausted administrative remedies, even though it ac-

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[2] ANCSA Native land grants are not granted as aboriginal entitlements. ANCSA allowed Native corporations to select certain acreage *amounts* within Alaska (in excess of 40,000,000 acres, together with $962,500,000 in funds; 43 U.S.C. §§1605, 1611), but did not convey to them specific tracts. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1018, 1020-1021 (D.Alaska 1977) aff'd 612 F.2d 1132 (9th Cir. 1980) *cert. denied* 449 U.S. 888 (1980).

knowledged, Findings, App. E, p. 69a, that Donnellys had sent a diligent letter to the Secretary of the Interior in 1959.

The Court of Appeals for the Ninth Circuit affirmed, adopting the theories that ANCSA "preempted" Donnelly's nonstatutory equitable remedies against the patentee Eklutna, that homestead rights are not among the land rights preserved by ANCSA §14(g), that ANCSA §22 is the exclusive remedy, that the Quiet Title Act of 1972 ("QTA") statute of limitations applies to §22, and that the accrual date of a §22 claim is the same date as under the QTA. App. A. These theories require review because they are the Ninth Circuit's definitive statement of land law under ANCSA, the most consequential and important federal legislation in Alaska since the Statehood Act.[3]

The Court of Appeals denied Donnelly's independent occupancy claim under ANCSA §14(c). The Court concluded that §14(c) required, in addition to occupancy, that the occupant first quiet his homestead title against the government under the QTA. It said that Native corporations had no "expertise" and therefore are immune from suit to enforce claims to land patented to them under ANCSA.

The Court of Appeals said that Donnelly's administrative case was not pending within 12 years of his counterclaim, notwithstanding the record (see below pp. 23-25).

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[3] The Court of Appeals said its decision is governed by *Lee v. United States*, 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom. Lee v. Eklutna, Inc.*, 56 U.S.L.W. 3498 (1988), App. A, p. 7a, but the *Lee* appellate opinion specifically disclaimed at 809 F.2d 1411 any opinion about the effect of ANCSA.

REASONS FOR GRANTING THE WRIT

SUMMARY

That Donnelly was denied 92.5 acres of land through a secretive disobedience of §24FPA is undisputed. Donnelly contends that he has three causes of action to protect his homestead entitlement: ANCSA §14(g) and §22(b), and nonstatutory equitable remedies. All are fully valid but each standing alone is sufficient cause for relief.

ANCSA §14(g) states: "All conveyances made pursuant to this chapter shall be subject to valid existing rights". Congress explained its understanding of "valid existing rights":

> All valid existing rights, including inchoate rights of entrymen and mineral locators, are protected.

1971 Code Cong. & Ad. News at 2250. "Entrymen" refers to homestead claimants. 43 U.S.C. §§161, 164. The courts below refused to enforce §14(g).

ANCSA §14(g) does not arise under the QTA and thus is not subject to the time limitations of 28 U.S.C. §2409a(g). The QTA statute of limitations applies only to suits challenging federal claims of ownership, not challenges to titles of government transferees.

The lower courts' retroactive imposition of the QTA statute of limitations on ANCSA upsets existing law. This ruling has a devastating impact in Alaska. As shown below, it effectively denies enforcement of all prior rights in 40 million acres to be conveyed to Native corporations under ANCSA: homesteads, homesites, trade and manufacturing sites, mining claims, fishing sites, transportation corridors, moorage and landing areas. The injustice to individuals is

clear. The ruling below portends to inundate the Claims Court with suits for uncompensated takings, the expense of which must be borne by the public at large.

ANCSA §22(b) is a further protection for homesteaders and others. The courts below have virtually nullified §22 by their theory—found nowhere in the statute or legislative history—that §22 is subject to the QTA statute of limitations, 28 U.S.C. §2409a(g). On the contrary, §22 is governed by 43 U.S.C. §1632(a), under which Petitioner's claim is not time-barred. As shown below, this ruling makes it virtually impossible for anyone to use §22(b) to enforce their titles to land selected by Native corporations.

The courts below likewise have nullified §14(c) of ANCSA by declaring that it applies only where the applicant can quiet his title against the United States under the QTA, a requirement nowhere expressed by Congress. This ruling has a wide destructive effect. There are thousands of residential and business occupants of public land in Alaska whose use and occupancy Congress took pains to protect. The courts below have refused to enforce this protection. The Ninth Circuit's decision is in direct conflict with the Supreme Court of Alaska's decision on the same issue. *Hakala v. Atxam,* 753 P.2d 1144 (Alaska 1988). As a matter of judicial efficiency this Court should review the decisions below because this is the threshold of extensive litigation in this area and *certiorari* review would settle the inevitable races to the courthouse which will ensue.

With respect to the Court of Appeals' computation of the QTA limitations period (assuming that period is relevant) that Court bent the facts to fit the result.

The government's records establish that Donnelly's BLM administrative claim was not finally decided until 1964, within the twelve year period prior to his counterclaim in 1975. This Court should grant review to assure fidelity to the requirement under 28 U.S.C. §2409a(g) that a plaintiff's right of action accrues when he knows the claim of the United States.

I. The Court of Appeals Has Nullified Pre-Existing Rights in Lands Selected Under the Alaska Native Claims Settlement Act.

The courts below believed Donnelly's relief was time-barred by QTA but acknowledged that any non-QTA causes of actions would not be so barred. Amended Opinion, Appendix A, p. 15a. Donnelly's causes of action under ANCSA §§14(c), 14(g), 22(b), obviously arise under ANCSA rather than the QTA. They are not time-barred and should not have been dismissed. Moreover, the lower courts' theory that ANCSA preempted Donnelly's nonstatutory equitable relief defies Congress's express purpose to preserve preexisting land rights.

A. ANCSA §14(g) Makes Conveyances to Native Corporations "Subject to" All Prior Rights of Homesteaders and Other Grantees.

The wording of §14(g) makes it a post-conveyance remedy: "All conveyances made pursuant to this Act shall be subject to valid existing rights". The Court of Appeals erred in applying 28 U.S.C. §2409a(g) to valid existing rights under ANCSA since the QTA ceases to operate once the United States has parted with title. 28 U.S.C. §2409a(e). Under no theory is the United States a party to a §14(g) claim. It claims no interest in the land; no federal interest is in dispute. *Provident Tradesmen's Bank & Trust Co. v.*

Patterson, 390 U.S. 102, 114, 119 (1968). That the United States issued the patent does not make it a party. *Daniels v. Wagner,* 237 U.S. 547, 567 (1915).

Since an action against ANCSA patentees is not a QTA action it is not governed by 28 U.S.C. §2409a(g) (applying only to "a civil action under" 28 U.S.C. §2409a). The appropriate limitations period is found in state law, Alaska Statute 9.10.230, which measures the limitations period from the issuance of patent. This is the correct period of limitations in the absence of an applicable federal statute.

QTA was never intended to extinguish any private rights or protect the government's transferees. *Block v. North Dakota,* 461 U.S. 273, 291 (1983) (QTA limits suits "against the United States" but "does not purport to strip . . . any one . . . of any property rights"), *Economic Development & Industrial Corp. v. United States,* 720 F.2d 1, 4 (1st Cir. 1983) (" transferee under a deed from the United States would not enjoy the protection" of QTA).

§14(g) "valid existing rights" include claims to fee interests such as homestead claims. 1971 Code Cong. & Ad. News at 2250; Laitos and Westfall, *supra,* at p. 20 n. 114, p. 44 n. 234, p. 58 n. 325. Homesteaders are clearly "entrymen" within the scope this intent. See 43 U.S.C. §§161, 164.[4]

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[4] The *Lee* district court stated an elaborate theory that "valid existing rights" in §14(g) do not include fee interests such as homesteads. Congress's understanding of "valid existing rights" is clear. See authorities cited in text. Had Congress felt a different definition was needed Congress would have stated it in §3, the definitions section, where such definition would apply uniformly to all ANCSA provisions where the term is used.

The lower court's refusal to enforce §14(g) disembodies the key savings provision of the Act. This Court should grant review to assure that the courts will enforce federally-granted rights in 40,000,000 acres of ANCSA lands. If left unreviewed, the decision below assures that no prior rights in ANCSA selected lands will be preserved because, as shown below, the QTA statute of limitations has expired as to all pre-ANCSA land claims. Pp.17-18

(ANCSA §§11(a), 14(g), 16(a), 17(b)(2), 19(a)). It did not do so.

The *Lee* district court looked to the second sentence of §14(g), 629 F.Supp. 729-31, but the phrasing "Where . . ." does not bespeak a definition. It argued that Native corporations lacked the "expertise" to understand fee interests. If Native corporations can not understand fee interests they can hardly be expected to understand leases, contracts, permits, rights-of-way and easements described in the second sentence of §14(g). BLM regulations indicate that §14(g) is not limited to non-fee interests. See 43 CFR §2651.5 (1977), App. Q, p. 137a, which adopts a meaning of "valid existing rights" not limited to leases, etc., listed in 43 CFR §2650.4-1 (1977), p. 134a. This "expertise" theory gives Native corporations an immune status. However, Congress explicitly disavowed any trust status or special privilege. ANCSA §2(b).

§14(g) is not silenced as a result of §22(b), as contended by the *Lee* district court. An action to enforce §22 is a suit against a government officer but, when ANCSA was enacted in 1971, neither QTA nor the APA waiver of sovereign immunity (Pub. L. 94-574, Oct. 21, 1976) had been enacted. Congress knew that a claimant could not ask for judicial enforcement of §22. It therefore viewed §14(g) as the primary and perhaps sole enforceable statutory remedy. Even now, §§14(g) and 22(b) serve complementary and not conflicting purposes: §22 orders the Secretary to issue patents but §14(g) assures that all rights are protected even if the Secretary fails to do so. ANCSA enacts no policy that pre-existing land rights must be settled prior to Native patents or that rights are extinguished after conveyance.

B. The Courts Below Have Voided Statutory Cutoff Dates for ANCSA §22(b) Claims and Have Subjected §22(b) to a Limitations Statute Which Has No Relation to ANCSA.

ANCSA §22(b) provides cumulative protection of prior homestead rights.

> The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 682), and who have fulfilled all requirements of the law prerequisite to obtaining a patent.

This is a non-QTA remedy since the United States claims no interest in lands patented to Native corporations. See 28 U.S.C. §2409a(a).

§22 is subject to the ANCSA statute of limitations, 43 U.S.C. §1632(a). §1632(a) reads:

> (a) . . . [A] decision of the Secretary under this chapter or the Alaska Native Claims Settlement Act shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later: *Provided,* That the party seeking such review shall first exhaust any administrative appeal rights.

A decision not to issue a homestead §22(b) patent is clearly final when the Secretary issues a patent for

the same land to a Native corporation. Moreover, the BLM has promulgated regulations that call for public and personal notice of an administrative hearing, the conclusion of which would commence the §1632 period. 43 CFR 4.901, 2650.7 (1977). That date is tied to the issuance of patent to a Native corporation and not to any claim against the United States under QTA. The date in this case is 1979, the year patent was issued to Eklutna, Inc., four years after Donnelly filed his counterclaim against the Secretary.[5]

Nevertheless the courts below have declared ANCSA §22(b) to be subject to limitations for quieting title against the United States. This is neither fair nor reasonable. 43 U.S.C. §1632 and 43 CFR §2650.7 (1977) give specific assurances that much later cutoff dates apply. The judicial announcement in 1986 that only 28 U.S.C. §2409a(g) (which by its terms applies only to actions under §2409a) applies violates these assurances. This is fundamentally unfair. Neither Congress nor the BLM expected ANCSA to work this way.

This novel and unexpected ruling is broadly destructive not only of Donnelly's land right but of virtually all pre-1971 rights (mining rights under §22(c) as well as §22(b) claims) in the 40 million acres to be conveyed by ANCSA. For these reasons the ruling below is unreasonable and renders ANCSA unconsti-

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[5] No prior notice was given Donnelly of the patent to Eklutna, despite Donnelly's request in the years 1975-1979 that he be notified of any administrative remedies available and despite 43 CFR 2650.7's directive that he be given such notice. The United States told Donnelly that no administrative remedies remained. Exhibit PPPP.

C. The Court of Appeals Has Decreed A Repeal of Equitable Remedies Recognized By This Court.

As already noted, Congress broadly preserved all land rights arising prior to ANCSA. §14(g), 1971 Code Cong. & Ad. News at 2250. Even in the absence of these statements,

> It is a well-established principle of statutory construction that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, 3 L.Ed. 453 (1813) [footnote omitted]

Norfolk R. & H. Auth. v. Chesapeake & Potomac Tel., 464 U.S. 30, 35 (1983), especially where "the elements of . . . federal law . . . are largely derived from the common law". Id. at 37. See also *Payne v. Central Pacific,* 255 U.S. 228, 238 (1921), *Rodriguez v. United States,* 107 S.Ct. 1391, 1392 (1987) and *California Federal Sav. and Loan Ass'n v. Guerra,* 107 S.Ct. 683, 689 (1987). Any new statutes affecting property rights are presumed to operate prospectively, *Bennett v. New Jersey,* 105 S.Ct. 1555, 1560 (1985); and the grant of a new right will not cut off existing non-statutory rights except where Congress states so clearly. *Federal Marine Terminals, Inc. v. Burnside Shipping Co. Ltd.,* 394 U.S. 404, 412 (1969).

Equitable remedies in public lands law—"constructive trust"—were developed early by this Court:

> It is the settled doctrine of this court with reference to the action of officers of the land department, that when the legal title has passed from the United States to one party,

> when in equity, and in good conscience, and by the laws of Congress it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title. This doctrine extends to the action of all officers having charge of proceedings for the alienation of any portion of the public domain. The parties actually entitled under the law cannot, because of its misconstruction by those officers, be deprived of their rights.

Rector v. Gibbon, 111 U.S. 277, 291 (1883). See also *Duluth & Iron Range Railroad Co. v. Roy,* 173 U.S. 587, 590 (1899), *Daniels v. Dineen,* 237 U.S. 568, 569 (1915) ("well settled principle"). This doctrine has been amply supplemented and refined by this Court. *Knapp v. Alexander-Edgar Lumber Co.,* 237 U.S. 162, 167-169 (1915) (collecting authorities), *Bockfinger v. Foster,* 190 U.S. 116, 125-126 (1903), Laitos and Westfall, *supra,* p. 29, p. 30 n. 161, p. 39. The purpose of such doctrine is to protect claimants against illegal withdrawals and other official errors. *Payne v. New Mexico,* 255 U.S. 367 (1921), *Wyoming v. United States,* 255 U.S. 489 (1921), *Litchfield v. Richards,* 76 U.S. 575, 577-578 (1870).

The Court of Appeals wrote,

> For the reasons stated in *Lee v. United States,* 629 F.Supp. at 728-729, this common law claim fails because it is preempted by ANCSA.

Amended Opinion, Appendix A, p. 16a. This places in issue the *Lee* district court preemption theory.

The *Lee* district court said that ANCSA §22(b) preempted prior law because it "spoke directly" to the subject and "occupied the field". 629 F.Supp. 728-729. However, this Court has never found any statute to preempt judicial remedies protecting preexisting property rights. See *Norfolk, supra, Usery v. Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) ("retroactive aspects of legislation . . . must meet the test of due process") and Laitos and Westfall, *supra*, at p. 8 n. 48.

The *Lee* preemption theory upsets Congressional intent. §14(g) and 1971 Code Cong. & Ad. News at 2250 declare all prior rights to be *preserved*. §22(b) could preempt neither §14(g) nor prior law since §22(b) was unenforceable when ANCSA was enacted. Sovereign immunity was an absolute barrier. See *Block* at 461 U.S. 282 (no officer's suit theory). QTA was not enacted until 1972, and the APA sovereign immunity waiver was enacted only in 1976. These latter enactments removed the sovereign immunity obstacle but the meaning of ANCSA is what it meant in 1971 upon its enactment. Congress could not have viewed ANCSA as "speaking directly" to prior law or "occupying the field". Federal equitable remedies are not preempted.

The *Lee* district court theory fails for historical reasons as well. ANCSA §22(b) was a restatement of what federal public lands statutes already required. 43 U.S.C. §§2, 164 and their predecessors commanded the Secretary to issue patents. Notwithstanding these statutes this Court repeatedly applied the constructive trust remedy where the Secretary failed in his duty. ANCSA §22(b) works no change in federal equitable remedies.

The United States itself has always insisted that the constructive trust remedy is effective under ANCSA:

> The defendant's [Donnelly's] remedy, is to be found in a court action by him against Eklutna, Inc. for the imposition of a constructive trust or other appropriate relief. *United States v. Schurz, supra,* [102 U.S. 378, 396 (1880)]; *Johnson v. Towsley,* 80 U.S. (13 Wall.) 72, 85-87 (1871); and *Fisher v. Rule,* 248 U.S. 314, 317-318 (1919). . . . If any controversy exists, it does not involve the United States, but exists between the defendant and Eklutna, Inc. as to who has the superior entitlement to title or possession.

CR-116, United States' Memorandum In Support of Motion to Dismiss United States As a Party, Nov. 2, 1979, pp. 7, 14. This contemporaneous government construction of ANCSA in Donnelly's favor deserves deference. *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

This preemption theory, if sustained, would render ANCSA unconstitutional. That this is true is readily shown. Under the *Lee* district court theory, the QTA statute of limitations would, in the first instance, totally foreclose all rights in federal land accruing more than 12 years prior to the enactment of ANCSA in 1971. As to rights accruing 1959-1971, the QTA limitations period would expire at various times between 1971 and 1983. However, the *Lee* gloss on §22(b), announcing the unexpected application of QTA to §22, was not even announced until 1986.

Only persons with future vision would have filed suit under §22(b) or §22(c) prior to 1983. Until the

early 1980s only a small fraction of ANCSA's 40 million acres had been conveyed to Native corporations and most of these lands had not been surveyed. Thus by 1983 few persons in Alaska could be aware that their land rights might conflict with a Native conveyance, and not until 1986 could they be aware of any rule making §22 their exclusive remedy. By that time, all such claims would be time barred, according to the interpretation of ANCSA which Petitioner asks this Court to review.

Here we have familiar and expected remedies being replaced by a theory that no one had reason to expect or use until it was too late to use it. We also have regulations promising prior notice and opportunity for hearing, together with a specific statute, 43 U.S.C. §1632(a), giving a distinct period for review. This common sense reading of ANCSA is now replaced without fair notice. The lower courts' rewriting of ANCSA works a change "sufficiently unusual in character, and triggered in circumstances so commonplace that an average citizen" would not regard it as "calling for a heightened awareness of one's legal obligation." *United States v. Locke,* 105 S.Ct. 1785, 1801 (1985) quoting Brennan, J., dissenting in *Texaco v. Short,* 454 U.S. 516 at 547 (1982). To prevent ANCSA from unconstitutionally foreclosing interests in 40 million acres of land, this Court should accept review. It should construe ANCSA as not preempting prior law and confirm that 43 U.S.C. §1632(a), and not 28 U.S.C. §2409a(g), applies to ANCSA §22(b).

II. The Court of Appeals Has Added Conditions to ANCSA §14(c) That Defeat Congress's Purpose to Protect Occupancy on ANCSA-Patented Lands.

ANCSA §14(c)(1) reads

> Each patent pursuant to subsections (a) and (b) of this section shall be subject to the requirements of this subsection. Upon receipt of a patent or patents: (1) The Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

The words "as of December 18, 1971" were added in 1980. Subsections 14(c)(2)-(5) provide for similar conveyances to nonprofit corporations, to municipal corporations, and for airport sites.

The Court of Appeals said that a §14(c) claim must be "based on" a QTA action against the United States. App. A, p. 16a. The Supreme Court of Alaska has read §14(c) correctly as lacking such condition. *Hakala v. Atxam, supra.*

§14(c) contemplates a gratuitous transfer ("without consideration") of the land to residence or business occupants. The enumeration of these conditions in §14(c) excludes the implication of others. *Fedorenko v. United States,* 449 U.S. 490, 513 (1981), *American Tobacco Co. v. Patterson,* 456 U.S. 63, 75 (1982). §14(c) does not say, convey land if the occupant has quieted title against the United States. If an occupant already owned the land and had quieted his title against the predecessor in interest, there would be no need for the statute. Congress did not write §14(c) as an exercise in futility. It would not make Native corporations give away land they did not own and someone else did.

ANCSA §22(b) provides for patents to persons who have homestead title. This language is omitted from §14(c). These ANCSA provisions were enacted concurrently. The omission of reference to pre-existing title from §14(c)(1) was therefore intentional. *INS v. Cardoza-Fonzeca,* 107 S. Ct. 1207, 1213 (1987).

Similarly, §14(c) does not say, convey land to occupants unless the land was classified as "withdrawn" prior to the Act. Congress in §11(a) provided that lands in specified land reserves in Alaska were not to be conveyed to Native corporations. Congress knew how and when to express this kind of exception. The omission of any reference in §14(c)(1) to former §24FPA reserves is therefore intentional and conclusive. *INS, supra.*

Congress enacted §14(c) to benefit persons without title, non-Native as well as Native. It did so knowing that thousands of such Alaskans were "squatters" on federal land without claim to title. Statement of Joseph Fitzgerald, Hearing on S. 1830, 91st Cong., 1st Sess. 121, 126 (1969). Congress knew that, without §14(c), ANCSA conveyances would upset long established possession and use by many persons. It knew this would cause widespread hardship, dislocation and resentment. Congress wanted to avoid this hardship. However, all entities protected by §14(c)(1)-(5) must now lose their grant, given the Court of Appeals interpretation that §14(c) creates no new rights in such persons and entities.

There is nothing unreasonable about what Congress has done but, in any event, courts lack power to decide what is or is not reasonable. *Rodriguez,* 107 S.Ct. 1393.

The Court of Appeals found Donnelly's occupancy unreasonable because the land was in an *alleged* power withdrawal—but forbade Donnelly to prove otherwise. That alleged withdrawal was clearly illegal and there is no reason to require Donnelly to resort to a QTA action to establish this fact. But, legal or illegal, occupancy ("primary place of residence or . . . business") alone is the sole condition.

Because Congress wrote ANCSA to permit native selections from all federal lands, both withdrawn lands and other lands, §14(c) operates uniformly on all lands so patented. Power withdrawals had a limited federal purpose—protection of future possible dam sites licensed under FPA. In permitting Native corporations to select lands in power withdrawals, all federal control ended and the function of any power withdrawal ceased. Once an ANCSA land selection was made, the policies which motivated Congress to require occupancy conveyances under §14(c) were then indifferent as to the previous status of the land.

Here ANCSA *does* work an implied repeal of earlier laws, since the plain language requires such result by necessary implication. Congress specifically defined "public lands" available for selection under ANCSA §3(e). The absence of any further restrictions under §14(c) is therefore telling. Congress surely knew that §14(c) would operate uniformly on all such lands. Moreover, ANCSA §26 (85 Stat. 715) declared that the provisions of ANCSA supersede all conflicting laws. The Court of Appeals' statement of "no indication of any congressional intent", App. A, p. 15a, is flatly contradicted by §26.

Though §14(c) does not require an antecedent right of occupancy, it is also settled that a person need *not*

sue the United States to establish his right of occupancy. Laitos and Westfall, *supra*, p. 15 n. 79, p. 18. Moreover, 43 U.S.C. §1632(b) specifically places on Native corporations, and not on the Department of the Interior, the duty to make §14(c) decisions and makes these decisions subject to judicial review. This necessarily requires determination and review of all essential facts and legal questions necessary to a §14(c) entitlement. It is clear that a Native corporation cannot escape deciding all relevant questions and cannot avoid judicial review of its decision. Thus the Court of Appeals erred in concluding that Donnelly cannot prove his right against Eklutna.

Moreover, §24FPA, the sole authority for any power withdrawal, does not prohibit *occupancy* of lands in any instance. It merely forbids location, entry, or "other disposal" until the FPC has determined that such disposal can be made without prejudicing construction of future dams. ("Entry" and "location" are terms with specific meaning in public lands law denoting acts of initiating a title claim.) Donnelly's occupancy right is even clearer given the FPC's determination of no injury. His occupancy was exactly what Congress intended. Cong. Rec., Vol. 58, pp. 2242-2243 (1919). Statutes such as §24FPA simply do not direct one land use to the exclusion of other uses. *Watt v. Western Nuclear*, 462 U.S. 36, 48-50 (1983) (Congress dissatisfied with pre-§24FPA withdrawal statutes precluding surface use of withdrawn lands).

Certiorari review is of great practical importance to the people of Alaska. Congress took pains to protect the use and occupancy of persons and businesses who have long occupied the vast public land areas of Alaska. Many of such uses are subsistence uses. By

requiring proof of preexisting title and antecedent right of legal occupancy, the Court of Appeals has scuttled this protection for the welfare of many Alaskans and the economy of Alaska as a whole.

III. Governmental Notices Show That Donnelly's Claim Against United States Accrued Long After Any Notice In the Federal Register.

A claim could not accrue under 28 U.S.C. §2409a(g) until the United States had particularized its claim with a definite description of the lands it disputed. 28 U.S.C. §2409a(d), (g).

The Federal Register notices referred to by the courts below appear as Appendices K and L. According to the Court of Appeals, these declared the government's decision as to which specific lands the government was contesting, terminated Donnelly's administrative claim, and commenced the 12 year period under 28 U.S.C. §2409a(g). Appendix A, p. 13a.

These notices were never served on Donnelly. Donnelly had good reason to think that any decision terminating the administrative proceedings would be served on him personally, as in fact it was served in 1964 and not in 1961. From the very commencement of Donnelly's BLM homestead case in 1958, the BLM kept an administrative file (A-043097, Findings, App. E, p. 65a, trial Exhibit EK-CQ) of all notices by the BLM to Donnelly about his claim.

As the Court of Appeals noted, the BLM withdrew its initial flat rejection of Donnelly's claim in 1959. App. A, p. 13a. The next three notices to Donnelly (as shown by the BLM file) appear as Appendices F (1961), G (1963) and H (1964). They all bear the original case file number, A-043097. It is obvious they all

deal with the same subject matter. Although the 1961 notice, App. F, stated that the United States claimed some land as reserved, the BLM admitted therein that its survey delineating the boundaries of the alleged reserve was inaccurate and that the BLM had made no final decision. It said, "Upon completion of the necessary investigations a *final decision* with an appropriate appeal period *will be issued* . . .". P. 88a, emphasis supplied. It was not until 1963-64 that a final BLM decision was made and served on Donnelly. Appendices G and H.

Donnelly had every right to rely on the established course of correspondence as a source of notice. He had no reason to think that the government would publish a relevant notice in the Federal Register. Hence Donnelly neither knew or should have known of the government's final administrative decision until 1964. 28 U.S.C. §2409a(g). Donnelly's counterclaim (1975) was clearly within even the 12 year QTA statute of limitation. The dismissals below should be reversed and a decree should enter quieting title in Donnelly.

During the course of the appeal, Donnelly advised the Court of Appeals that the trial exhibits, including the BLM administrative file described above (Exhibit EK-CQ), had not been transmitted to the Court of Appeals. The Court of Appeals failed to bring the exhibit before it or to review it. Hence we have an appellate decision deciding the case without reviewing the record on appeal, in particular, the original evidence as to the central issue underlying that Court's theory of affirmance—the accrual of Donnelly's claim. The Court of Appeals thus "so far departed from the accepted and usual course of judicial proceedings . . .

as to call for an exercise of this Court's power of supervision". U.S. Sup. Ct. Rule 12.1(a).

CONCLUSION

The decision below leaves no remedy to the many Alaskans whose titles and occupancy claims should be preserved under ANCSA. The decision affects not only the residences and livelihoods of many individuals, but large enterprises and investments such as fishing sites and mineral interests.

The issues are clear. The Court of Appeals has voided major statutory provisions, ANCSA §§14(c), 14(g) and 43 U.S.C. §1632, and rendered §22(b) virtually unenforceable. It has made ANCSA confiscatory rather than ameliorative.

The equitable claims are compelling. Donnelly unmistakably has been victimized. Thousands of others face similar treatment.

The failure of the appellate court to examine the record places into question the integrity of the federal appellate courts.

These issues speak for themselves. Petitioner asks this Court to grant a writ of *certiorari.*

Dated this 23rd day of September, 1988.

STEVEN P. OLIVÉR
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Attorney for Petitioner
Therese U. Donnelly

88-539

Supreme Court, U.S.
FILED
SEP 24 1988
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CLERK

No. 88-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,
Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR and DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEN P. OLIVER
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THERESE U. DONNELLY, Personal Representative of the Estate of JOSEPH F. DONNELLY, deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; SECRETARY OF THE INTERIOR; DIRECTOR, BUREAU OF LAND MANAGEMENT and EKLUTNA, INC.,
Defendants-Appellees.

No. 86-4428

D.C. No. A75-27-F

JAMES W. LEE
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; SECRETARY OF THE INTERIOR; DIRECTOR, BUREAU OF LAND MANAGEMENT; EKLUTNA, INC.; COOK INLET REGION, INC.,
Defendants-Appellees.

No. 87-3834

D.C. No. CV-79-336

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, Chief District Judge, Presiding

Argued and Submitted
February 4, 1988—Seattle, Washington

Filed March 10, 1988
Amended June 27, 1988

Before: Alfred T. Goodwin* and Betty B. Fletcher, Circuit Judges, and Earl H. Carroll,** District Judge.

Opinion by Judge Fletcher

SUMMARY

Real Property

Appeal from judgment in action involving title to land. The court affirmed, holding that quiet title claims against the U.S. are subject to a 12-year statute of limitations, which appellants allowed to expire.

The Federal Power Commission restored land to homestead entry. Appellants the Donnellys' homestead applications to settle on some of this land were rejected in 1957 and again in 1959. From 1957 through 1968, the Donnellys tried to gain title by various means. However, they departed from the formal appeal procedure of the BLM as early as 1959. In 1965 they received a homestead patent to 67.5 acres, leaving 92.5 acres in dispute. The parties disagree as to whether the patent to 67.5 acres represented a compromise and settlement. In 1970, the Donnellys received a notice of trespass from the government and were ordered to leave the land. The following year Congress passed the Alaska Native Claims Settlement Act (ANCSA), which extinguished aboriginal land claims of Alaskan natives in exchange for the right of native corporations to select acreages of public lands. Appellee Eklutna, Inc., selected the lands claimed by the Donnellys.

*Alfred T. Goodwin, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, was drawn to replace Judge Anderson, who was on the original panel but died before this order was filed.

**The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

The government then filed a trespass action against the Donnellys, who counterclaimed against the United States under the Quiet Title Act. The government patented the land to the native corporations, and its trespass action was dismissed, leaving only the Donnellys' counterclaims and third party claims against Eklutna. The district court dismissed the Donnellys' counterclaims against the U.S. and their third party claim of title against Eklutna. Later, it granted summary judgment dismissing the Donnellys' second cause of action against Eklutna, based on section 14(c)(1) of ANCSA.

[1] To the extent that 28 U.S.C. § 1331, 43 U.S.C. § 161 and 43 U.S.C. § 1601 go to the Donnellys' claim to title, they do not function independently of the QTA in the Donnellys' action, do not by themselves waive sovereign immunity, and therefore do not confer jurisdiction. [2] Assertion of the APA as an independent means for pressing title disputes against the government has been rejected. [3] However, it is not necessarily the case that the APA is unavailable as a *jurisdictional* ground, as opposed to a *remedy*. [4] Quiet title claims against the United States are subject to a 12-year statute of limitations. [5] The Donnellys did not follow the administrative review procedure. [6] Thus, it cannot be said that the statute was tolled by their pursuit of administrative process. [7] In order to challenge the validity of Eklutna's patents, the Donnellys must establish their own entitlement to the lands. Because the U.S. is an indispensable party to this action and the district court lacked jurisdiction as to the claims against the U.S., the claims against Eklutna required dismissal. [8] Section 14(c)(1) cannot operate as a sort of amnesty provision extending rights to individuals who are merely trespassers, failed homesteaders, or land users without any vested rights prior to December 1, 1971. [9] Appellants argue that they are not trespassers, by virtue of their vested equitable title to the land. Their section 14(c)(1) claims are based on their title claim, which cannot be resolved in any action to which the U.S. is not a party.

COUNSEL

Steven P. Oliver, Anchorage, Alaska, for the plaintiffs-appellants.

Vicki L. Plaut, Land & Natural Resources Division, Department of Justice, Washington, D.C.; David P. Wolf, Copeland, Landye, Bennett and Wolf, Anchorage, Alaska, for the defendants-appellees.

ORDER

The panel amends the opinion filed March 10, 1988 to add the following footnote after the word "trespassers" at the end of the sixth line at page 7594:

> "Counsel for appellant has called to the attention of the court a decision of the Supreme Court of Alaska, *Hakala and Kitchen v. Atxam Corp.* No. 3304, (April 22, 1988), decided after the filing of the decision in this case, that reaches a contrary result."

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has called for an en banc rehearing. Fed. R. App. P. 35(b)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

FLETCHER, Circuit Judge:

This action arises from a land dispute between the United States and several homesteaders in the Eagle River Valley area in Alaska. Some of these claims have already been decided adversely to the claimants, on jurisdictional grounds. *See McIntyre v. United States*, 789 F.2d 1408 (9th Cir. 1986); *Lee v. United States*, 629 F.Supp. 721 (D. Alaska 1985), *aff'd*, 809 F.2d 1406 (9th Cir. 1987), *cert. denied, sub nom. Lee v. Eklutna, Inc.*, _ S.Ct. _, 56 U.S.L.W. 3498 (Jan. 26, 1988).

Donnelly appeals the district court's dismissal of this action.[1] We affirm.

BACKGROUND

In 1950, the Federal Power Commission (FPC) set aside certain lands in the Eagle River Valley for possible power development projects, thereby withdrawing the lands from the public lands open to entry by homesteaders. Two years later, the FPC issued a "no injury" determination that power development in the area would not be injured if the lands were restored to homestead entry. Although § 24 of the Federal Power Act (FPA), 16 U.S.C. § 818, provides that the Secretary of the Interior shall restore lands to entry after a "no injury" determination, the Secretary did not do so (for unknown reasons). Accordingly, the Donnellys' homestead applications to settle on some of this land were rejected in 1957 and again in 1959. From 1957 through 1968, the Donnellys tried to gain title by various means, including petitions to their congressional representatives and to the Secretary of

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[1]Therese U. Donnelly, as personal representative of the estate of Joseph F. Donnelly, deceased, was substituted as the Appellant in this action following the death of her husband, the original appellant, who brought suit on behalf of the Donnellys.

the Interior, repeated renewals of the homestead application with the Bureau of Land Management (BLM), and, later, specific challenges to the power classification withdrawal. However, they departed from the formal appeal procedure of the BLM as early as 1959, and only availed themselves of the procedure in 1967-68, when they began a renewed challenge to the power site classification. The Donnellys retained legal counsel in 1963, and in 1964 they applied for homestead patent to 67.5 acres, which surveys showed were outside the boundaries of the withdrawn lands. They received a patent to this portion in 1965, leaving 92.5 acres in dispute. The parties disagree as to whether the patent to 67.5 acres represented a "compromise and settlement."

In 1970, the Donnellys received a notice of trespass from the government and were ordered to leave the power reserve land and remove improvements they had placed on it. The following year Congress passed the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (*codified at* 43 U.S.C. §§ 1601-41), which extinguished aboriginal land claims of Alaskan natives in exchange for the right of native corporations to select acreages of public lands. In 1974, Eklutna, Inc., selected the lands claimed by the Donnellys. In 1975 the government filed a trespass action against the Donnellys, who counterclaimed against the United States under the Quiet Title Act (QTA), Pub. L. No. 92-562, 86 Stat. 1176 (*codified at* 28 U.S.C. § 2409a). In 1979, the government patented the land to the native corporations, and its trespass action was dismissed, leaving only the Donnellys' counterclaims and third party claims against Eklutna.

On November 5, 1982, after a bench trial, the district court dismissed the Donnellys' counterclaims against the United States and their third party claim of title against Eklutna. On November 13, 1986, the district court granted summary judgment dismissing the Donnellys' second cause of action against Eklutna, based on § 14(c)(1) of ANCSA, 43 U.S.C. § 1613(c)(1). Finally, on December 5, 1986, the district court

amended the 1982 memorandum decision, and entered summary judgment against the Donnellys on their remaining claims based on ANCSA, §§ 14(g) and 22(b) and on violations of equal protection and due process.

DISCUSSION

I. Lack of Jurisdiction

The QTA provides the exclusive remedy for resolving title disputes against the United States. *Block v. North Dakota*, 461 U.S. 273, 286 (1983). Defendants urge, and the district court found, two grounds for dismissal under the QTA of the counterclaims against the United States: that the United States disclaimed interest in the land and that the statute of limitations had run. Significantly, if the United States is dismissed from the case the title claims against Eklutna must be dismissed also because the United States is an indispensable party to the Donnellys' action against Eklutna. *Lee v. United States*, 809 F.2d at 1410-11.[2]

A. United States' Disclaimer of Interest

Section 2409a(e)[3] provides that:

> If the United States disclaims all interest in the

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[2]As a threshold matter, the Donnellys argue that their title claims are asserted as defenses to the government's trespass action against them, and thus cannot be dismissed under § 2409a according to *Block*, 461 U.S. at 291-92, which stated that "[n]othing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits." The Donnellys' interpretation of *Block* may well be correct, hypothetically; in this case, however, their argument is meritless because the United States' trespass action against the Donnellys was dismissed after the land was patented to Eklutna. Thus, their assertion of title in this action is thrown back upon their counterclaims, which must stand or fall under the QTA.

[3]Formerly § 2409a(d), prior to 1986 amendments.

> real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of, the authority conferred by section 1346(f) of this title.

(Section 1346(f) is the jurisdiction-vesting counterpart to § 2409a's waiver of sovereign immunity.) The United States conveyed the disputed homestead property as required under ANCSA, and the disclaimer was confirmed by the district court as valid and in good faith. *See Lee v. United States*, 629 F.Supp. at 726. Therefore, the district court is without jurisdiction over the Donnellys' counterclaims, unless there is an alternate jurisdictional ground independent of § 1346(f)'s "quiet title" jurisdiction.

[1] The Donnellys urge that federal question jurisdiction be found under 28 U.S.C. § 1331, because their claims implicate 16 U.S.C. § 818 (§ 24 of the FPA, authorizing withdrawal of lands from entry), 43 U.S.C. § 161 (the Homestead Act, repealed 1976) and 43 U.S.C. § 1601 (ANCSA). To the extent that these statutes go to the Donnellys' claim to title, they do not function independently of the QTA in the Donnellys' action, do not by themselves waive sovereign immunity, and therefore do not confer jurisdiction.

A more complicated question is presented by the suggestion that the Donnellys have a separate jurisdictional ground under the Administrative Procedure Act (APA), 5 U.S.C. § 702, which waives sovereign immunity for claims of wrongs suffered by agency action. The Donnellys claim they suffered such wrongs because the BLM misapplied FPA § 24 and the homestead laws. It is ambiguous whether, and to what extent, the APA confers jurisdiction in this case on this basis.

[2] On one hand, the QTA provides the exclusive remedy for title disputes against the government, and assertion of the APA as an independent means for pressing such suits has been expressly rejected. *Block*, 461 U.S. at 286 n.22; *McIntyre v. United States*, 789 F.2d 1409, 1410 (9th Cir. 1986); *Lee v. United States*, 809 F.2d at 1409 & n.2. In *Block*, the Court rejected North Dakota's claim that the APA's 1976 amendments established "a new supplemental *remedy*" (emphasis added) to assert property title against the United States. 461 U.S. at 286 n.22. The Court noted that the APA could not be interpreted to overcome the QTA's exclusive remedy because the APA "specifically confers 'no authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.' " *Id.* The QTA expressly forbade relief where the 12-year limitations period had run, under § 2409a(g).[4]

[3] However, it is not necessarily the case that the APA is unavailable as a *jurisdictional* ground, as opposed to a *remedy*, under the reasoning of *Block*. We must consider whether § 2409a(e) "forbids relief" under the QTA when the United States has disclaimed an interest in the property, when an alternate jurisdictional basis would otherwise exist under the APA. In other words, does the existence of an alternate jurisdictional basis preserve jurisdiction for resolving *title disputes* under the QTA, or does the qualifying language of § 2409a(e) simply mean that the disclaimer of interest will not divest the court of jurisdiction over independent claims not disputing title?

In *Lee v. United States*, we suggested that allegations of "administrative wrongdoing" will trigger the exception to § 2409a(e) and provide a jurisdictional basis for the QTA claim.

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[4]Formerly, § 2409a(f).

> We do not hold, and do not read *McIntyre* to hold, that the Quiet Title Act constitutes the exclusive source of jurisdiction for *all* claims against the United States involving the United States' disposition of public lands. Section 2409a(e) of the Act provides that upon the United States' disclaimer of interest, jurisdiction in the district court will continue if the court "has jurisdiction . . . on ground[s] other than and independent of the authority conferred by [the jurisdictional provision of the Act]." 28 U.S.C. § 2409a(e)(West Supp. 1987). The Administrative Procedure Act provides jurisdiction in cases of administrative wrongdoing.

809 F.2d at 1409 n.2. Significantly, no independent administrative wrongdoing was alleged in *Block* or *McIntyre*, and in *Lee* it was alleged but barred by the statute of limitations. 809 F.2d at 1409 n.2. Presumably, in *Block* and *McIntyre* the only "administrative wrongdoing" was the government's alleged wrongful assertion of title itself, and this, without more, could not make the APA into a jurisdictional peg for a QTA claim. However, the Donnellys assert that the Secretary's unjustified failure to obey § 24 of the Federal Power Act wrongfully prevented them from establishing title.

There is a good reason to allow the Donnellys to assert the APA as a jurisdictional basis for their title dispute under § 2409a(e). Otherwise, a claim founded on a title dispute stemming from administrative wrongdoing might be rendered unreviewable by the United States' pre-trial disposal of the property, because § 2409a(e) would require dismissal of the claim against the United States. Moreover, in any title dispute or trespass defense against the successor-in-interest to the United States (here, Eklutna), the Donnellys would be barred from asserting their "administrative wrongdoing" theory of title because, under *Lee*, the United States would be a necessary party over whom no jurisdiction could be exercised. *Lee*, 809 F.2d at 1410-11. We also note that any APA

claim raised by the Donnellys against the United States would be premised on the title dispute; since the APA does not authorize money damages, the Donnellys could not state a claim for relief under the APA. Even an inverse condemnation action could be barred if the Donnellys are not entitled to assert title to the land. In sum, we are not aware of a claim of administrative wrongdoing that could be brought in these circumstances other than a QTA claim.

We conclude that § 2409a(e) allows jurisdiction over a title dispute where the title claim is founded on alleged administrative wrongdoing, beyond a simple assertion of title by the government. *See Lee*, 809 F.2d at 1409 n.2. If the government deprives someone of title by administrative wrongdoing, it cannot evade review simply by selling or otherwise disposing of the property.[5]

B. Statute of Limitations Bar

Quiet title claims against the United States are subject to a 12-year statute of limitations from the date on which the claimant "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). This statute of limitations applies retroactively. *See Block*, 461 U.S. at 284; *Grosz v. Andrus*, 556 F.2d 972, 975 (9th Cir. 1977). If the statute of limitations has run, we lack jurisdiction to consider the Donnellys quiet title claims. *Block*, 461 U.S. at 292; *McIntyre*, 789 F.2d at 1411. We review de novo the district court's determination concerning QTA jurisdiction. *Lee*, 809 F.2d at 1408.

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[5] *McIntyre* does not require a different result. In *McIntyre*, we stated that the APA, 5 U.S.C. § 702 "did not create an independent jurisdictional basis for challenging the government's title to real property." 789 F.2d at 1410-11. There, as in *Block*, we considered only whether the APA could afford relief where the 12-year statute of limitations had run; we did not consider the "disclaimer bar" of 28 U.S.C. § 2409a(e). We decline to construe *McIntyre* as requiring the absurd result that the government could deprive someone of property title by administrative wrongdoing and then immunize its actions by selling the contested property on the eve of trial.

The Donnellys filed their answer and counterclaims against the United States on May 21, 1975. Accordingly, their QTA claim is barred if it accrued prior to May 21, 1963. The Donnellys first received notice of the government's position—that sizable portions of their claim were within withdrawn lands—as early as 1957, and their last administrative appeal was rejected in 1968, but the facts are not clear as to the date within this period on which the Donnellys' claim accrued. The Donnellys argue that their claim accrued only when the administrative procedures were completed. In *Crown Coat Front Co. v. United States,* 386 U.S. 503, 511-12 (1966), the Court held that where a government contract provided for administrative review of the contract dispute in the first instance, the statute of limitations begins to run only on accrual of the "right of action" in district court, following administrative review. *Crown Coat Front* suggests to us that a QTA claim should not accrue until administrative procedures are exhausted, so long as an action brought by a claimant prior to exhaustion would be subject to dismissal on that ground. *Cf. McIntyre,* 789 F.2d at 1411 ("At the very latest, the Secretary of the Interior's final and unfavorable March 11, 1964, decision rejecting the notice of homestead entry should have given McIntyre knowledge that the government claimed an interest in the land."). The district court concluded that, under the regulations in effect at the time, the Donnellys' claim was subject to dismissal for non-exhaustion. Dist. Ct. Memorandum at 11-12 (citing *Montgomery v. Rumsfeld,* 572 F.2d 250, 254 (9th Cir. 1978); *Davis v. Nelson,* 329 F.2d 840, 847 (9th Cir. 1964)). If we assume that the district court is correct, we would concede that had the Donnellys followed the administrative appeals process, their claim in district court under the QTA would not have accrued until some final BLM decision was rendered.

[5] The problem for the Donnellys is that they did not follow the administrative review procedure.[6] The local BLM

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[6]This procedure called for an appeal to the BLM Director and then to the Secretary of the Interior. *See Davis v. Nelson,* 329 F.2d at 846-47.

office rejected the Donnellys claim in a decision dated November 11, 1957. That decision gave notice of the appeal procedure, but was not received by the Donnellys, who had moved. However, it was handed to Mrs. Donnelly in April 1958, when she went to the BLM office having heard from a neighbor that the Donnelly claim had been closed. A BLM official told Mrs. Donnelly that her only recourse was to refile the homestead claim, which she did. Before the response to this claim came down, the Donnellys tried political channels, contacting Delegate (later Senator) Bartlett, who tried unsuccessfully to intervene on their behalf, and (together with Lee and others) petitioning the Assistant Secretary of the Interior. The responses generated by these efforts uniformly insisted that the Donnellys' claim on the withdrawn lands was invalid, and even that they were in trespass. The Donnellys' claim was again rejected by the local BLM office by letter dated March 5, 1959.[7] The Donnellys did not appeal, but rejected the BLM's decision, refused the BLM's tender of their homestead filing fees, and stated that they would await the resolution of their claim between Senator Bartlett and the Interior Department. The BLM responded that it would deposit the Donnellys' money in a "suspense account" pending final action "determined by Senator Bartlett and the Interior Department."

[6] Thus, by 1959 the Donnellys had departed from the formal appeal procedure. It therefore cannot be said that the statute of limitations was tolled by their pursuit of administrative process, regardless of whether any action they might have thereafter brought would be subject to dismissal for nonexhaustion. In 1961, the Federal Power Commission notified the BLM that the disputed land was withdrawn by a new Power Site classification, and in the same year the BLM filed a Plat of Survey (notice of which was published in the Federal Register), which determined that all but 67.5 acres of the

[7] It is unclear from the record whether this letter advised the Donnellys of their appeal rights.

Donnellys' claim was on withdrawn land. We agree with the district court that by this time at the latest, the Donnellys had sufficient notice "of the claim of the United States" to start the 12-year limitations period. 28 U.S.C. § 2409a(g); *see also Lee*, 629 F.Supp. at 724; 809 F.2d at 1410. Moreover, the Donnellys by 1961 were not engaged in pursuit of administrative remedies that would toll the statute of limitations.[8] The 12-year limitations period had expired by the time the Donnelly's brought their counterclaims in 1975.

C. Claims Against Eklutna

[7] The Donnellys assert quiet title claims against Eklutna, Inc., which received patents to the disputed lands from the United States. In order to challenge the validity of Eklutna's patents, the Donnellys must establish their own entitlement to the lands. *Lee*, 809 F.2d at 1410. The United States is an indispensable party to the action against Eklutna, because the Donnellys "can only properly establish their asserted entitlement to the disputed lands in direct proceedings against the United States.... It follows from the fact that the United

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[8] In 1963 and 1964, less than 12 years from the filing of the counterclaims, the Donnellys retained counsel, met and corresponded with BLM officials, contacted another Senator, filed a new homestead claim, and finally received patent to the undisputed lands in 1965. The BLM maintained a consistent position that the disputed lands were not open to homestead entry. In 1967 and 1968, the Donnellys, for the first time, filed claims and appeals with the Interior Department to have the power classifications revoked. These were finally rejected in 1968.

Although a "final" determination of the Donnellys' claim was made in 1968, this claim was a renewal of their earlier claim, and is not an appropriate accrual date for their QTA action.

We note that the Donnellys "sat on their rights" and brought no quiet title claim from October 1972, when QTA was enacted, until May 1975, when they filed their counterclaims in response to the government's trespass action against them. (The government served the Donnellys with a notice of trespass in 1970.) The statute of limitations expired during this period.

States is an indispensable party to this action that the district court's lack of jurisdiction as to the claims against the United States requires the dismissal of the claims against the Native corporations." *Id.* at 1411. Accordingly, the Donnellys quiet title claims against Eklutna must be dismissed.

II. Non-QTA Claims

The Donnellys argue that their claims under ANCSA § 14(c) and the common law theory of "constructive trust" do not hinge on the QTA and are therefore not barred by the jurisdictional defects of the QTA claims.The same ANCSA claim is advanced here by James Lee. It was not decided in the published *Lee* decisions, and has been consolidated with the Donnellys' appeals.

A. ANCSA § 14(c)

Appellants claim that Eklutna, Inc., and Cook Inlet Region, Inc., (the native corporations) violated § 14(c)(1) of ANCSA, 43 U.S.C. § 1613(c)(1), by failing to convey them the disputed land. Section 14(c)(1) provides that the native corporation receiving patents under ANCSA "shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate of the tract occupied as of December 18, 1971 . . . as a primary place of residence, or as a primary place of business . . ." Appellants claim to have been occupying the disputed lands as primary places of residence and business as of December 18, 1971. The district court held that, as trespassers, Lee and Donnelly could not be held to have "occupied" the lands within the meaning of § 14(c)(1).

[8] As the district court noted, § 14(c)(1) could not operate as "a sort of amnesty provision extending rights to individuals who are merely trespassers, failed homesteaders, or land users without any vested rights prior to December 1, 1971," because there was no indication of congressional intent to override the established principle that individuals could

obtain no rights to withdrawn lands. *See United States v. Consolidated Mines and Smelting Co.*, 455 F.2d 432, 444 (9th Cir. 1971). Moreover, the congressional intent to provide a "just and fair settlement" of native land claims is inconsistent with an interpretation of § 14(c)(1) that would reduce the land patented to native corporations in favor of trespassers.[9]

[9] However, appellants argue that they are not trespassers, by virtue of their vested equitable title to the land. We need not resolve this merits issue.[10] In *Lee*, 629 F.Supp. at 730-32, the district court held that ANCSA could not require native corporations to resolve the merits of a homesteader's title dispute with the government. The same reasoning should apply to ANCSA § 14(c)(1). To the extent that an occupant is entitled only to a conveyance of land if he is not in trespass, appellants' § 14(c)(1) claims would require the native corporation to resolve the appellants' title dispute with the government. Put another way, appellants' § 14(c)(1) claims are, again, based on their title claim, which cannot be resolved in any action to which the United States is not a party. Accordingly, the § 14(c)(1) claims are also barred by the QTA statute of limitations.

B. "Constructive Trust"

The Donnellys claim that the disputed lands were improperly conveyed by the United States to Eklutna, and therefore should be considered held by Eklutna in constructive trust on behalf of the Donnellys. For the reasons stated in *Lee v. United States*, 629 F.Supp. at 728-29, this common law claim fails because it is preempted by ANCSA.

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[9]Counsel for appellant has called to the attention of the court a decision of the Supreme Court of Alaska, *Hakala and Kitchen v. Atxam Corp.* No. 3304, (April 22, 1988), decided after the filing of the decision in this case, that reaches a contrary result.

[10]We note that any resolution of the merits would call for speculation as to whether the appellants' claims may have been superseded by other claims even if the Secretary had followed FPA § 24.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's dismissal of appellants' claims against all defendants.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH F. DONNELLY,

Defendant.

JOSEPH F. DONNELLY,

Plaintiff on Counterclaims,

v.

UNITED STATES OF AMERICA, et al.,

Defendants on Counterclaims.

NO. A 75-27 Civil
MEMORANDUM OF DECISION

FACTS[1]

Joseph P. Donnelly, on April 22, 1957, filed at the local land office of the Bureau of Land Management (BLM) in Anchorage a notice of location or occupancy for a homestead site in the Eagle River valley. The BLM determined that Donnelly's location fell within both Power Site Clas-

[1] For a more complete discussion of the facts refer to the findings I made dated February 5, 1981.

sifications #399 (established March 29, 1950) and #107 (established June 6, 1925).

Unbeknownst to Donnelly, earlier in 1952 the BLM had requested from the Federal Power Commission (FPC) a determination under Section 24 of the Federal Power Act, as amended,[2] that the value of the land as a power site would suffer no injury if opened to selection, entry, or location. The FPC responded by issuing its no-injury determination, thereby allowing the Secretary of Interior (Secretary) to reclassify the land. By 1957, some but not all of the land had been either restored to entry or reserved for other purposes. Donnelly's claimed land was part of the land that remained withdrawn under the power site classification.

Accordingly, the BLM rejected Donnelly's homestead claim in 1957. Donnelly first learned of the rejection letter in April 1958. The letter stated that the land was withdrawn under a power site classification and therefore not subject to entry. The letter informed Donnelly that he could appeal this rejection to the Director of BLM and that he could petition the FPC to restore the land. The letter added a caveat that should the FPC restore the land, Donnelly would not receive a preference right to the land.

Based on the advice of a local BLM official, Donnelly filed a second notice of settlement with the land office. In addition, Donnelly filed a petition with the FPC seeking restoration. The FPC responded advising Donnelly that a Section 24 no-injury determination covering the land had previously issued and that restoration to entry was a matter for the BLM. The FPC suggested Donnelly again inquire at the Anchorage land office.

In July 1958, Donnelly notified Alaska's territorial delegate to Congress, Bob Bartlett (later United States Sen-

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[2] 16 U.S.C. §818.

ator Bartlett) of his problem with the BLM and requested assistance in obtaining patent. In the meantime, Donnelly submitted his final proof for patent on his claim. Three days later, March 5, 1959, his claim was rejected because of the conflicting power site classification. Donnelly was also warned that further occupancy would constitute trespass and he was informed that his filing fees would soon be refunded.

Instead of taking an appeal from this final determination, Donnelly wrote BLM stating that he did not accept their final determination, that his rights were "beyond conclusive question," and that he would return the refunded filing fees pending resolution of the ongoing communications between Senator Bartlett and the Interior Department. Donnelly at no time has sought administrative relief of the BLM's rejection of his claim although at one time he attempted to obtain a resolution of his grievance with the BLM by appealing to United States Senators Bob Bartlett and Ernest Gruening.

The BLM was notified on April 21, 1961 by the FPC that the land in dispute had been withdrawn once more under Power Site Classification #2296. After that date, land within the power site classification has not been available for homestead entry. The BLM advised Donnelly in 1962 that the method employed in surveying land within power site reservations had been refined. This adjustment resulted in a determination that 67.5 acres of Donnelly's claim was now outside the reserve. Donnelly filed yet another application and ultimately received a patent to the 67.5 acres on June 25,1965. In 1971 the land was withdrawn for selection by the village of Eklutna under provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. §1601, et. seq. Eklutna filed a village selection on July 17, 1974 and ultimately received a patent to the land on May 24, 1979.

LAW

The United States brought a trespass claim on February 10, 1975 to enjoin Donnelly's further use of the disputed land. Donnelly defended that action by claiming that he had equitable title to the land and but for the unlawful actions of the Secretary he would have received a patent to the land. Donnelly also counterclaimed against the United States for a determination upholding the validity of his homestead claim and for an order requiring the Secretary to grant Donnelly a patent. I initially held the government's trespass action in abeyance pending determination of the validity of Donnelly's claim. After the United States patented the land to Eklutna Corporation pursuant to the Alaska Native Claims Settlement Act, I dismissed the government's trespass action. Eklutna, as record owner of the land, has appeared in order to protect its interest. From the outset I have felt that this suit raises difficult problems of federal jurisdiction. I refused to dismiss this action at earlier stages believing that the development of a factual record would shed needed light on the jurisdictional issues. For the following reasons I now hold that this court lacks jurisdiction over Donnelly's counterclaims.

SOVEREIGN IMMUNITY

Donnelly has named as a defendant, among others, the Secretary of Interior. It is established law in this circuit that an action against a federal official, who is alleged to have acted unconstitutionally or in violation of his statutory authority, is not necessarily barred by the doctrine of sovereign immunity. *City of Santa Clara v. Andrus,* 572 F.2d 660, 679 (9th Cir. 1978). The nature of the relief sought controls. If the relief sought is not limited to cessation of alleged unlawful conduct but requires affirmative action by the sovereign or disposition of unquestionably sovereign property, jurisdiction may be defeated by sovereign immunity. *Larson v. Domestic and Foreign Com-*

merce Corporation, 337 U.S. 682, 691 (1949); *City of Santa Clara v. Andrus,* 572 F.2d at 679.

The substance of Donnelly's counterclaims is that the Secretary violated a mandatory duty under 16 U.S.C. §818 to restore the land to entry once the FPC issued a Section 24 no-injury determination. Since the Secretary violated that obligation, Donnelly asks that the validity of his homestead claim be judicially recognized and the Secretary ordered to issue a patent for the remaining ninety-two and one-half (92.5) acres of land. This relief sought would require not only affirmative action but involve the disposition of federal property precluded by *Larson.*

A narrow exception to the bar against affirmative relief exists when the burden imposed on the government by granting the requested relief would not outweigh any considerations of private harm; if the government is merely "minimally inconvenienced" by the relief sought, sovereign immunity poses no bar. *City of Santa Clara v. Andrus,* 572 F.2d at 679; *DeLao v. Califano,* 560 F.2d 1384, 1391 (9th Cir. 1977).

I conclude that this case does not fall within this narrow exception. A factor of consideration when assessing the burden on the government is whether the relief sought would jeopardize prior transactions between the government and third parties. *City of Santa Clara,* 572 F.2d at 679. In this case, the land Donnelly seeks has as early as 1971 been withdrawn for selection by the village of Eklutna under ANCSA, 43 U.S.C. §1601 *et. seg.* Eklutna filed a village selection on July 17, 1974 and received patent to the land on May 24, 1979. To now grant the relief Donnelly seeks would jeopardize the effective administration of the ANCSA program and disturb the settled expectations of Eklutna Corporation. The undoing of these prior transactions, plus the burden of finding adequate replacement land for Eklutna, go well beyond the minimal inconvenience test discussed in *City of Santa Clara.*

Since under *Larson* this action is a suit against the sovereign, Donnelly must demonstrate a specific statutory waiver of sovereign immunity as well as an independent basis for federal jurisdiction.

a. Quiet Title:

The first of Donnelly's claims of federal jurisdiction is a quiet title action under 28 U.S.C. §2409a(a), an express waiver of sovereign immunity. This court has jurisdiction over civil actions under §2409a pursuant to 28 U.S.C. §1346.

There was considerable doubt at one time as to whether or not §2409a might be applied to the facts of this case. In any event, Donnelly's reliance now on this statute is misplaced. In 1972 Congress added 28 U.S.C. §2409a (f) imposing a twelve year statute of limitations on actions under §2409a(a). This limitation on actions has been held to have retroactive application. *Grosz v. Andrus,* 556 F.2d 972, 975 (9th Cir. 1977).

The cause of action is deemed to have accrued on the date Donnelly knew or should have known of the United States' interest. 28 U.S.C. §2409a(f); *Park County, Montana v. United States,* 626 F.2d 718, 720 (9th Cir. 1980). On March 5, 1959, Donnelly received a rejection letter from BLM which expressly stated that despite the Section 24 no-injury determination, the land in question was presently withdrawn and would in all probability remain so at least until it was surveyed. Donnelly was notified that any further use or occupancy would "constitute a trespass against the United States government."

I conclude that on March 5, 1959 Donnelly knew of the extent of the United States' claim and his cause of action, if any, under §2409a(a) thereby accrued. Since he failed to assert his claim until 1975, it is now barred by §2409a(f). In suits against the United States, the defense of statute

of limitations goes to the very jurisdiction of the court. *Park County, Montana v. United States,* 626 F.2d at 720.[3]

b. Mandamus:

Donnelly tries to find jurisdiction by invoking federal mandamus jurisdiction under 28 U.S.C. § 1361. This effort fails for two reasons: Donnelly's lawsuit does not present a proper request for the extraordinary remedy of mandamus, and 28 U.S.C. §1361 does not provide a waiver of sovereign immunity.

Mandamus is traditionally proper only to command an official to perform an act which is so plainly prescribed as to be free from doubt. *Smith v. Grimm,* 534 F.2d 1346, 1352 (9th Cir. 1976); *Jarette v. Resor,* 426 F.2d 213, 216 (9th Cir. 1970); *see also, Knuckles v. Weinberger,* 511 F.2d 1221 (9th Cir. 1975) (interpreting strict standard to permit mandamus to compel compliance with due process requirements).

Donnelly's mandamus argument is essentially as follows. Once the FPC issued a Section 24 no-injury determination, the Secretary was statutorily obligated to revoke the power site classification and open the land for homestead entry. Donnelly relies on the recent decision *Reeves v. Andrus,* 465 F.Supp. 1065 (D. Ak. 1979) as authority for the Secretary's duty under 16 U.S.C. §818. Since Donnelly's claim was rejected because of the conflicting power withdrawal, had the Secretary restored the land to entry as required, Donnelly maintains his claim would have been accepted and a patent issued. Donnelly cites *inter alia, Lane v. Hoglund,* 244 U.S. 174 (1917); *Armstrong v. Udall,* 435 F.2d 38 (9th Cir. 1970); *Zwang v. Udall,* 371 F.2d 634 (9th Cir. 1967) for the proposition that once a homestead

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[3] Donnelly argues that the statute of limitations did not run because government actions amounted to fraudulent concealment and promises of future consideration of his claim. These allegations are wholly unsupported by the record.

applicant has completed all statutory requirements necessary to perfect a claim, and the validity of the claim may no longer be questioned, a plain duty on the government exists and mandamus will lie to compel that action.

The United States responds that under *Buch v. Morton*, 449 F.2d 600, 607 (9th Cir. 1971) and the so-called "track-book rule", even if the Secretary had a duty to revoke the power site classification, until the Secretary acts the lands remain withdrawn and ineligible for entry. I do not now decide the applicability of the government's position to Donnelly's mandamus theory because his theory fails on a more fundamental level. His theory rests on the proposition that the Secretary has a mandatory duty, enforceable by mandamus, to open land to *homestead entry* once a Section 24 determination is issued. I find no authority for this proposition.

Donnelly's reliance on *Reeves v. Andrus*, 465 F.Supp. 1065 (D. AK.1979) is misplaced. The only issue resolved in that decision was whether or not the Secretary could refuse to modify a relevant power site classification once a non-injury determination had been made. *Reeves*, 465 F.Supp. at 1067. The court rejected the Secretary's position in Reeves that despite a no-injury determination he retained discretion under Section 24 of the Federal Power Act, 16 U.S.C. §818, to refuse to revoke the power site classification for reasons unrelated to the power site value of the reserved land. The court held that the Secretary has no such discretion and must revoke the withdrawal. But the court was careful to limit the holding and explicitly stated:

> The Secretary's power to withdraw the land in order to protect other public values is a different issue and has nothing to do with the Secretary's discretion under 16 U.S.C. §818.
>
> . . . .
>
> This ninety day period would allow the Secretary

> to determine whether there are other public values or interests in the land that require the site to be withdrawn from entry under other powers possessed by the Secretary.

Reeves, 465 F.Supp. at 1069-70. The court expressly distinguished the absence of discretion under §818 from the Secretary's statutory or implied "other powers" which require the exercise of discretion. The Secretary might have chosen to open the land as Donnelly suggests or he might have chosen to withdraw the land under his "other powers." Mandamus does not lie to compel a particular application of the Secretary's discretion.

Furthermore, since this is an action against the sovereign, Donnelly must demonstrate a specific statutory waiver of immunity. 28 U.S.C. §1361 does not provide a waiver of sovereign immunity. *Smith v. Grimm,* 534 F.2d 1346, 1352 (9th Cir.), *cert. denied,* 429 U.S. 980 (1976); *Cape Fox Corp. v. United States,* 456 F.Supp. 784, 794 (D.Ak. 1978). As discussed *infra,* the Administrative Procedure Act, 5 U.S.C. §702 waiver of sovereign immunity is unavailable to Donnelly.

c. Federal Question Jurisdiction:

The final basis of federal jurisdiction which Donnelly has pleaded is 28 U.S.C. §1331. Donnelly argues that his cause of action arises under the various homestead statutes as well as 16 U.S.C. §818. However, §1331 does not provide a waiver of sovereign immunity. *Smith v. Grimm,* 534 F.2d 943 (9th Cir. 1973); *Cape Fox Corp. v. United States,* 456 F.Supp. 784, 794 n.23 (D. AK. 1978).

The Administrative Procedure Act does provide a waiver of sovereign immunity. 5 U.S.C. §§701-706; *Cape Fox Corp., v. United States,* 456 F.Supp. at 795. The parties have extensively briefed the applicability of the APA to this action. I initially ruled that Donnelly could not proceed

under the APA. Because of the significance of this determination, I will elaborate on my ruling.

The APA is unavailable to Donnelly for several reasons. Principally, Donnelly has never undertaken to exhaust his administrative remedies. This failure has prevented the development of an adequate record for judicial review some sixteen years later.

Donnelly's essential grievance with the BLM concerns the rejection of his homestead applications in 1957 and 1959 based on the conflicting power site classifications which he maintains should have been revoked sometime after the 1952 no-injury determination.[4] When Donnelly was first notified that his claim was rejected in 1957, the rejection stated that he could appeal that decision to the Director of BLM under 43 C.F.R. §§ 221.1 - 221.4. When Donnelly received the second rejection letter in 1959, he was notified that despite the no-injury determination the power site classification would not be revoked in the near future. At that time Donnelly should have taken an appeal to the Director and possibly to the Secretary under 43 C.F.R. §221.31.

In order to seek judicial review of agency action, plaintiff must first exhaust available administrative remedies. *Montgomery v. Rumsfield,* 572 F.2d 250 (9th Cir. 1978). If a statute or valid administrative regulation mandates exhaustion, failure to exhaust is a jurisdictional defect unless exhaustion would be futile or inefficacious. *Compare Doria Mining & Engineering Corp. v. Morton,* 608 F.2d 1255, 1257 (9th Cir. 1979) *with Aleknagik Natives Ltd. v. Andrus,* 648 F.2d 496 (9th Cir. 1980). If no such statutory duty exists, it is within the sound discretion of the trial

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[4] Donnelly's grievance is so limited because from 1961 until the land was withdrawn by Eklutna in 1971, the land was properly withdrawn under another power site classification without a corresponding subsequent Section 24 no-injury determination.

court to determine whether or not a judicial exhaustion requirement should apply. *United Farm Workers v. Arizona Agricultural Employment Relations Board,* 669 F.2d 1249, 1253 (9th Cir. 1982); *Montgomery v. Rumsfield,* 572 F.2d at 252-253. The trial court must consider the need for an administrative record for proper judicial review, the agency's interest in applying its own expertise and correcting its own errors, and the desire to preserve the efficient and independent existence of the administrative process. *Montgomery v. Rumsfield,* 572 F.2d at 254.

5 U.S.C. §704 limits judicial review to "final agency actions" for which there is no other adequate remedy in a court. Agency regulations should be examined to determine if final agency action has occurred. The regulatory scheme in existence in 1959 is not as conceptually clean as the present 43 C.F.R. §4.21(b) requirement of administrative exhaustion. Nonetheless the Ninth Circuit Court of Appeals imposed an exhaustion requirement in the very regulations that applied to Donnelly. *Davis v. Nelson,* 329 F.2d 840, 846-47 (9th Cir. 1964).

Under 43 C.F.R. §221.1 any party adversely affected by a decision of a BLM officer has a right of appeal to the Director of BLM. On appeal, the Director must render a written decision, 43 C.F.R. §221.9, which can then be appealed to the Secretary. 43 C.F.R. §221.31. The regulations specifically contemplate that a decision is not final at least until it has been considered by the Director. 43 C.F.R. §221.10 provides:

> When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed except for fraud or for gross irregularity.

43 C.F.R. §221.31 further provides:

> Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director whether such final decision is on an appeal or is an original decision. . . .

Finally, 43 C.F.R. §221.101 suspends the effectiveness of a decision during appeal. *Compare,* 5 U.S.C. §704.

Clearly, the regulations in existence in 1959 required exhaustion at least to the stage where the Director renders a written decision. *C.f., Doria Mining & Engineering Corp. v. Morton,* 608 F.2d at 1257. Donnelly's failure to appeal to the Director constitutes a jurisdictional defect precluding judicial review.

Even if exhaustion were not statutorily mandated, the need for an adequate record would warrant imposition of a judicial exhaustion requirement. *Montgomery v. Rumsfield,* 572 F.2d at 254.[5] The present record fails to reveal whether or not Donnelly would have received a patent had the land been opened to entry.

As discussed above, *Reeves v. Andrus,* 465 F.Supp. 1065 (D. Ak. 1979) holds that the Secretary must within a reasonable time after a no-injury determination revoke the power site classification and either reopen the land or reclassify it under his "other powers." Testimony of L.T. Main, BLM Operations Supervisor at the time, indicates that had the classification been revoked, it is likely that the land would have been opened to entry as Donnelly contends. Apparently, the land was not reopened because BLM had not yet surveyed the land.

Main also testified that there was a serious problem with trespassers and that BLM was seeking to restore the land in a manner that could prevent the statutory preference

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[5] The need for an adequate record also supports a finding that exhaustion would be neither futile nor inefficacious. Aleknagik Natives, Ltd. v. Andrus, 648 F.2d 496 (9th Cir. 1980).

rights of the territory, state, various agencies, and veterans from divesting homesteaders who had unlawfully settled on withdrawn lands. In fact, Donnelly was explicitly warned in the 1957 rejection letter that restoration of the land would not give him a priority claim to the land.

It is impossible to tell whether Donnelly would have received a patent had the power site classification been revoked. Had the land been restored, Donnelly's right to a patent would then depend upon whether or not a preference claim was filed, and whether the BLM lawfully prevailed in its efforts to avoid the preference claims.

Had Donnelly pursued an administrative appeal, he could have urged his construction of 16 U.S.C. §818 on the BLM. The agency would then have been forced to confront their obligation to revoke the power site classification. If BLM persisted in its refusal to revoke the classification, timely judicial review would have ordered the revocation and forced the BLM to determine whether or not the land should be reclassified. If BLM chose to reopen the land, it would then have had to confront the issue of preference claims. The point is that pursuit of administrative remedies would have developed an adequate record so that a reviewing court could determine with certainty whether or not Donnelly would have received a patent. As the case now stands, some sixteen years later, that cannot be done.

The significant passage of time also bars Donnelly's use of the APA, and his claims for relief in general, under the equitable doctrine of laches. *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982); *Coalition For Canyon Preservation*, 632 F.2d 774, 779 (9th Cir. 1980). Donnelly was advised of his status at the latest in 1959 when he received the second rejection letter. He waited until 1975 to assert his rights relying instead on non-agency and non-judicial means for a solution to his difficulty with BLM. Moreover, prejudice to Eklutna, Inc.

is clear; no other suitable comparable land remains to satisfy its ANCSA entitlement.

d. Estoppel:

Donnelly advances a number of arguments against the United States alleging misfeasance. Donnelly contends that the United States should therefore be estopped from denying the validity of his homestead claim. However, the doctrine of estoppel against the United States for actions concerning public lands is very narrow. *United States v. California*, 322 U.S. 19, 67 S.Ct. 1658, 91, L.Ed. 1889 (1947); *Saulque v. United States*, 663 F.2d 968 (9th Cir. 1981). The United States cannot be estopped for either the unauthorized acts of its agents or for acts performed in the exercise of its sovereign power. *Saulque v. United States*, 663 F.2d at 973. Since Donnelly claims the acts of malfeasance were unauthorized and since the issuance of a patent is an exercise of sovereign power, estoppel does not apply. *Saulque v. United States*, 663 F.2d at 976.

Conclusion:

For the above reasons, I find that I lack jurisdiction to consider Donnelly's claims against the United States and Eklutna. Since Donnelly cannot establish a right to the patent, he cannot challenge the issuance of the patent to Eklutna. *Kale v. United States*, 489 F.2d 449, 454 (9th Cir. 1973). Accordingly, Donnelly's claims are dismissed with prejudice against the United States and Eklutna. This judgment does not affect Eklutna's trespass action against Donnelly.

DATED at Anchorage, Alaska, this 5th day of November, 1982.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD,
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BEFORE:
THE HONORABLE JAMES M. FITZGERALD, JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH F. DONNELLY, Defendant.	Case No. A75-027 Civil Case No. A79-336 Civil
JOSEPH F. DONNELLY, Third-Party Plaintiff, vs. SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT, AND EKLUTNA, INC., Third-Party Defendants.	
JAMES W. LEE, Plaintiff, vs.	

UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT, EKLUTNA, INC., AND COOK INLET REGION, INC., Defendants.	Thursday, November 13, 1986 FINDINGS OF FACT AND CONCLUSIONS OF LAW

REPORTED BY: JANIS G. ROLLER, C.
Thursday, November 13, 1986

PROCEEDINGS:

The Court: In United States versus Joseph Donnelly, A75-027 civil, and James Lee versus United States, A79-336 civil.

From notes and memoranda, I now place of record my ruling on the pending motion for summary judgment.

There will be either a signed memorandum or an opinion, which will more fully and carefully set forth my analysis and conclusion.

What is now placed of record is to decide the issues, because of the express concern of the court of appeals that a decision be made as quickly as possible in the matter.

These consolidated motions require this court to analyze and interpret, for the first time, I believe, Sections 14(c)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. Section 1613(c)(1)(1982).

The central issue presents the following question: can individuals assert claims based upon Section 14(c)(1) to the

surface estate of lands conveyed under the Alaska Native Claims Settlement Act to Alaska Native Village Corporations when these lands have been withdrawn from entry by the United States prior to the time that the individuals entered and remained upon them? I conclude that they cannot.

The factual background has been, at least in part, stated in findings of fact in the case of *United States v. Donnelly*, A75-027. The background I now relate will expand upon that and will also relate to the Lee case, A79-336.

Donnelly and Lee staked out homestead claims during 1957 in the Eagle River Valley, adjacent to the municipality of Anchorage, about fourteen miles from downtown. They both filed notices of location with the Bureau of Land Management that same year, and entered upon their claims.

In ~~1957~~-58, the Bureau of Land Management notified Donnelly and Lee by letter that significant portions of their homestead claims had previously been withdrawn by the federal government as part of Power Site Classification Number 107, established June 12, 1925, and Power Site Classification Number 399, established March 29, 1950, and were therefore not available for private use or occupancy under the Homestead Act.

The Bureau of Land Management's letter to Lee stated:

> "Use or occupancy of the lands within the Power Site Classification is unauthorized and any development or use of the land will constitute trespass against the United States Government."

The Bureau of Land Management's letters to both Donnelly and Lee indicated that they could petition the Federal Power Commission to restore the lands they sought to public entry, but noted that such a restoration would not confer upon them any preference rights to the lands.

When the Donnellys and Lee petitioned the Federal Power Commission for restoration of the lands they sought to the public entry, the Federal Power Commission notified them by letter that it had already made a determination in 1952, (under Section 24 of the Federal Power Act, 16 U.S.C. Section 818 (1982)), that the value of those lands as a Power Site would suffer "no injury" if opened to selection, entry or location under the public land laws.

The Federal Power Commission indicated that it had no authority to restore the lands in question to public entry; it noted that "restoration [was] a function of the Bureau of Land Management," and directed the Donnellys and Lee back to the Bureau of Land Management.

No restoration order was ever issued by the Bureau of Land Management or the secretary. In 1959, the Bureau of Land Management rejected both Donnelly's and Lee's homestead entries because of their conflict with the Power Site withdrawals. The Bureau of Land Management notified both individuals by letter that although the Federal Power Commission had made a "no-injury" determination as to lands within the Power Site Withdrawals, none of those unsurveyed lands had been restored to entry by the Bureau of Land Management or the Department of the Interior, and they therefore remained in a withdrawn status.

The Bureau of Land Management indicated that, as a result, any use or occupancy of the lands within the Power Site Withdrawals would be "unauthorized" and would "constitute a trespass against the United States government."

During the late 1950's and early 1960's, Donnelly and Lee both attempted to gain approval of their homestead applications through negotiation with the Bureau of Land Management and various political channels, and they retained legal counsel in 1963.

Throughout these years, the Bureau of Land Management position regarding the disputed lands remained consistent. As the Bureau of Land Management indicated in correspondence with Alaska's territorial delegate, E.L. Bartlett, and with Senator Ernest Gruening, and with the Donnellys and Lee, the disputed Power Site Lands remained withdrawn from entry, and any settlement on those land would constitute a trespass and not obtain any rights for the settler.

Moreover, the Bureau of Land Management emphasized that even if the Power Site Withdrawals were revoked, as the Donnellys and Lee were requesting, they would not necessarily secure rights to the lands they sought, because the Alaska Statehood Act, Pub. L. 85-508, July 7, 1958, 72 Stat. 339, granted the state of Alaska a first preference right of selection for any lands previously withdrawn as part of the Power Site Reserves that were restored to public entry. *See* Alaska Statehood Act Section 6(G), and, moreover, that veterans of World War II and the Korean War were guaranteed a right of preference otherwise not granted to homestead applicants.

On March 15, 1961, the Bureau of Land Management promulgated a notice that it was filing a platted survey covering the claims. This noticed was published in the Federal Register on March 23, 1961. *See* 26 Fed. Reg. 2486 (1961). The survey delineated the boundaries of Power Site Classification Numbers 107 and 399 in relation to the homestead sites selected by Donnelly and Lee, and was filed in the Anchorage Bureau of Land Management Office on April 1, 1961.

Soon after its publication, on April 27, 1961, the Bureau of Land Management issued a final decision rejecting Lee's entry insofar as it conflicted with the Power Site Withdrawals.

In April 1962, the Bureau of Land Management promulated the notice that was amending the March 1961

platted survey, and published that notice in the Federal Register. *See* 27 Fed. Reg. 3701 (1962). Based upon the 1962 amendment, the Bureau of Land Management determined that 67.5 acres of Donnelly's 160-acre claim and 95 acres of Lee's 160-acre claim lay outside the withdrawals for Power Site Classifications 107 and 399.

During 1963-64, Donnelly, Lee, their legal counsel, and several other Eagle River-Area homesteaders attended a series of meetings with representatives of the Bureau of Land Management to explore possible solutions regarding the disputed lands contained within the Power Site Withdrawals.

The record states that prior to 1963, at least 23 settlers in the Eagle River Valley had staked homestead claims in conflict with the Power Site Withdrawals, but 18 of these individuals had already resolved their disputes with the Bureau of Land Management. Because of this, the Bureau of Land Management, apparently, took the view that the agency was restricted in concessions it could offer to Lee and Donnelly: Bureau of Land Management officials believed that any favorable treatment to Donnelly or Lee would necessitate reopening the other 18 cases.

In 1964, the Bureau of Land Management sent letters to Donnelly and Lee proposing a "compromise" resolution of their disputed homestead claims, and the BLM reiterated its position that the lands claimed by Donnelly and Lee within the Power Site Withdrawals were not available for entry and occupancy, but provided that the residence time they had accumulated on those lands would be counted as "constructive residence" accomplished on the portions of their homesteads outside of the withdrawals.

The letters further required that Donnelly and Lee satisfy the cultivation requirements and place a habitable house on the portions of their homesteads outside of the withdrawals, but noted that if the Power Reserves were eventually revoked, and the state of Alaska did not select

the tracts under its preference right authority, the Bureau of Land Management would accept applications from them for contiguous parcels to their existing homestead claims.

Lee accepted the Bureau of Land Management's proposed compromise offer in 1964, and he submitted proof that he had fulfilled the requirements for establishing a homestead on the 95 acres he had originally staked that lay outside of the boundary of the Power Site Withdrawals.

In November 1964, the Bureau of Land Management issued patent to Lee for those 95 acres.

Donnelly completed the requirements for establishing a homestead on the 67.5 acres within his claim that lay outside the boundaries of the Power Site Withdrawal, and in June 1965 the Bureau of Land Management issued him a patent for that land.

The Bureau of Land Management continued to exert control over the lands within Donnelly's and Lee's original claims that lay within the Power Site Withdrawals and granted a timber permit for those lands in 1965 to one Raymond Roop, over Donnelly's and Lee's protests.

Lee and Donnelly petitioned the Bureau of Land Management to revoke the Power Site Withdrawals in 1967-68.

In 1968, the Bureau of Land Management rejected their petition on grounds that it was necessary to retain the Power Site Withdrawals to leave open the possible future development of the Eagle River area for power purposes and to avoid placing an unnecessary additional financial burden on future power developers, even though development of the Eagle River area for power was not then scheduled.

In January 1969, then-Secretary Stuart Udall issued Public Land Order 4582, which withdrew from entry all lands in the state of Alaska which were otherwise unre-

served or would become unreserved during the course of the order. Thus, to the extent that public lands had not been validly withdrawn previously, Public Land Order 4582 flatly closed these lands to entry and occupancy. The lands were withdrawn from entry, once again, by the Alaska Native Claims Settlement Act, Section 11(a)(1), 43 U.S.C. Section 1512(a)(1), enacted in 1971.

Throughout this period, both Donnelly and Lee continued to use and occupy the disputed lands. In December 1970, both individuals were served with notices of trespass and notices to remove unauthorized structures, stating that they had unlawfully entered upon withdrawn federal lands, substantially altered its character by clearing and excavating, and had constructed physical structures upon it.

There is some indication in the record that after they received patent to the lands in their homestead entries outside of the Power Site Withdrawals, one or both families had returned to the withdrawn lands and resumed residence there.

The Bureau of Land Management's notices specified that Donnelly and Lee were to vacate the disputed lands and remove all structures by July 1, 1971.

As of August 1971, only Lee had demonstrated any intention of complying with the Bureau of Land Management's notices, and although he had begun to dismantle his buildings, he had requested and received an extension until September 1, 1971 to remove the remainder of the improvements.

In contrast, Donnelly had proceeded with the construction of his house on the disputed land, and had almost completed it by August 1971.

Although Lee did not meet his September 1971 deadline for moving off the withdrawn lands, a Bureau of Land Management inspection of that property on November 2,

1971 indicated that he had removed all improvements as of that date.

Lee testified in his deposition that he had vacated the disputed property by November 2, 1971, and that he did not place any improvements on the disputed land after vacating the property.

Since Lee ultimately complied with the Bureau of Land Management's directives, the trespass filed regarding his case was closed on November 16, 1971.

Donnelly, on the other hand, failed to comply with the Bureau of Land Management's orders, and the United States ultimately initiated the present trespass action against him in 1975.

It is apparent, upon the face of this record, that at no time when Donnelly and Lee settled upon the lands that are the subject of this litigation were those lands open for entry under the public land laws.

The lands that Donnelly and Lee originally claimed within Power Site Classifications 107 and 399 remained under federal control throughout most of the 1970's. In 1974, the Native Village Corporation of Eklutna, Inc., organized, pursuant to the Alaska Native Claims Settlement Act Section 8, 43 U.S.C. Section 1607, filed its land selection application under the Alaska Native Claims Settlement Act Section 12, 43 U.S.C. Section 1611.

Eklutna's selection included these disputed lands. In 1979, the United States issued a patent for the surface estate of these lands to Eklutna and a corresponding patent for the subsurface estate to Cook Inlet Region, Inc., as the Native Regional Corporation within the village of Eklutna was included. *See* 43 U.S.C. Section 1613(f).

The United States initiated the present trespass action against Donnelly in 1975, when he asserted, as a defense, that he possessed equitable title to the disputed land and

would have held patent were it not for the unlawful actions of the secretary. He claims that the Secretary and the Bureau of Land Management violated federal law by failing to open the power site withdrawals to homesteading after the Federal Power Commission issued its "no-injury" determination, and that the federal defendants intentionally misled him concerning the status of the disputed lands and the procedures to be followed when he originally settled the area and attempted to secure a title.

Donnelly also interposed counterclaims against the United States requesting a determination upholding the validity of his homestead claim and an order requiring the secretary to grant him a patent.

After the United States issued its patent to the surfaced estate of the disputed lands to Eklutna in 1979, I dismissed the government's trespass action, and Eklutna came into the action in order to protect its ownership interest in the disputed lands.

Donnelly subsequently filed a series of claims against Eklutna, claiming that his rights to title in the disputed lands were preserved as against Eklutna through the Alaska Native Claims Settlement Act Sections 14(g), 43 U.S.C. Section 1613(g), and 22(b), 43 U.S.C. Section 1621(b), as well as through the application of several common-law theories, and in addition claiming title to the lands, relying upon the Alaska Native Claims Settlement Act, Section 14(c)(1).

I have already dismissed all Donnelly's counterclaims against the United States and all his claims against Eklutna, with the exception of the Section 14(c)(1) claim for lack of subject-matter jurisdiction or for failure to state a claim upon which relief can be granted.

Lee initiated an action in 1979 against the United States, the Secretary, the Bureau of Land Management Director, Eklutna and Cook Inlet Region, seeking to acquire patent

to the disputed lands within his original homestead claim. He asserted essentially the same claims in his action as had Donnelly, including claims based upon common-law theories and Sections 14(c)(1), 14(g) and 22(b) of the Alaska Native Claims Settlement Act.

I dismissed all of Lee's claims, except for his Section 14(c)(1) claim, for lack of subject-matter jurisdiction or for failure to state a claim on which relief can be granted. *See Lee v. United States*, 629 F. Supp. 721 (D. Alaska 1985).

Thus, Donnelly's and Lee's only remaining claims in their actions are those based upon Section 14(c)(1) of the Alaska Native Claims Settlement Act.

Now, addressing Donnelly's and Lee's claims based upon Section 14(c)(1), it is necessary to resolve the single threshold question: can individuals be held to have "occupied" lands eventually patented to Village Corporations as of December 18, 1971 if at all times of their use of those lands, the lands remained withdrawn from entry by the federal government.

Looking to the language, purposes and legislative history of the Alaska Native Claims Settlement Act, as well as that of other public land laws which may be relevant, I conclude that Donnelly and Lee cannot be held to have "occupied" lands for purposes of granting Section 14(c)(1) rights if those lands had been withdrawn from public entry by the federal government.

I further conclude that the lands at issue were validly withdrawn as part of the power site classifications 107 and 399, and that they were never subsequently restored to public entry under the public land laws.

Donnelly and Lee contend that under the plain language of Section 14(c)(1), all that is required for an individual to obtain rights to village corporation lands under that provision is that the person have physically "occupied [those

lands] as of December 13, 1971 . . . as a primary place of residence. or as a primary place of business, or as a subsistence camp site, or as headquarters for reindeer husbandry," regardless of the status of those lands or the individual's right to use or reside upon them. 43 U.S.C. Section 1614(c)(1).

Hence, Donnelly and Lee contend that physical presence upon these lands alone is sufficient to create Section 14(c)(1) rights. Under their interpretation, Section 14(c)(1) in effect serves as a sort of amnesty provision extending rights to individuals who are merely trespassers, failed homesteaders, or land users without any vested rights prior to December 1, 1971.

I cannot agree that mere physical presence is sufficient to constitute "occupancy" as that term is used under Section 14(c)(1). Therefore, I reject Donnelly's and Lee's proposed interpretation of the provision.

It was well established, prior to the Alaska Native Claims Settlement Act, that individuals could not obtain rights under the public land laws to lands that had been withdrawn from entry by the federal government. *See United States v. Consolidated Mines and Smelting Company,* 455 F2d 432 (9th Cir. 1971); *Christie v. Great Northern Railway Company,* 284 F. 702 (9th Cir. 1922); *United States v. Anderson,* 113 F. Supp. 1, (D. Alaska 1953), *Affd.* 218 F.2d 780 (9th Cir.)

The interpretation of Section 14(c)(1) advanced by Donnelly and Lee would operate to change this long-established principle. I cannot conclude that this is what Congress intended. In fact, when Congress has intended to make land withdrawals from public entries for Power Sites or other purposes available for claims based upon the public land laws, it has felt compelled to enact provisions expressly authorizing such claims. *See* 16 U.S.C. Section 1634(d) "authorizing consideration of allotment ap-

plications filed before December 18, 1971 for lands included within Power Site Withdrawals under certain conditions."

Moreover, it seems unlikely that Congress would have intended to reward trespassers who were physically occupying lands withdrawn from public entry in 1971, by granting them title to lands conveyed under the Alaska Native Claims Settlement Act, at the expense of native village corporations. As the record indicates, about 23 settlers originally claimed lands within power site classifications 107 and 399. Only a small handful continued to pursue their claims past the early 1960's, and even Lee abandoned his claim when served with a notice of trespass by the federal government.

It is inconceivable that Congress intended to reward these trespassers, like Donnelly, who remained on the withdrawn lands despite numerous letters, notices and visits from federal officials. Such an interpretation would be particularly unlikely in light of the principal purpose of the Alaska Native Claims Settlement Act. It would be peculiar for a statute intended to provide "a fair and just settlement" of all native land claims to serve "the real economic and social needs of [Alaska's] natives" to transform an individual's trespass into valid title while reducing the lands provided to a native village corporation by a corresponding amount. 43 U.S.C. Section 1601(A)-(B).

Finally, Donnelly and Lee contend that even if individuals cannot obtain section 14(c)(1) rights to lands that have been withdrawn from public entry by the federal government, they are entitled to the disputed lands because those lands were not validly withdrawn when they initiated their claims.

They contend: First, that the Secretary did not intend to withdraw the lands from public entry and to create Power Site Classifications 107 and 399; second, that the Secretary lacked authority to do so; and, third, that even

if the Secretary had such authority, he was required to restore the lands to public entry once the Federal Power Commission had made its "no-injury" determination in 1952.

As a result, Donnelly and Lee maintain that they both acquired Section 14(c)(1) rights when the Alaska Native Claims Settlement became law in 1971.

I reject all of these contentions. First, Donnelly and Lee maintain that Power Site Classifications 107 and 399 do not constitute orders withdrawing lands from entry because they do not contain the word "withdraw"; Donnelly and Lee contends instead that the two orders are nothing more than "factual determinations" concerning the desirability of the lands described for Power Site Development.

However, this contention is clearly incorrect. Both orders expressly indicate that the Power Site Classifications they create will have "full force and effect," and Power Site Classification 399 expressly guarantees that it will protect all "valid existing rights." Such language would be unnecessary and superfluous unless the two orders effected land withdrawals and were not merely factual determinations.

Moreover, the secretary and the Federal Power Commission have consistently interpreted the two orders as withdrawing lands from entry under the public land laws, and I must defer to the administrative agency's interpretation of its own order. *See Udall v. Tallman,* 380 U.S. 1 (1965); *Udall v. Oelschlaeger,* 289 F.2d 974 (9th Cir. 1968).

Thus, Power Site Classifications 107 and 399 were plainly intended to withdraw lands from entry under the public land laws.

Second, the Secretary, clearly, had authority to withdraw lands for the two power sites in 1925 and May 1850 based upon the Pickett Act, 43 U.S.C. Section 141 (re-

pealed October 21, 1976 by Pub. L. 94-579, Section 704(a), 90 Stat. 2792), enacted in 1910:

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress."

43 U.S.C. Section 141 (Secretary lacked authority, absent a pending application, to establish a power site).

Courts have long held that the president's authority under Section 141 to withdraw public lands from entry and reserve them as Power Sites can be exercised by the Secretary of the Interior. *Wilbur v. U.S. Ex Rel. Barton,* 46 F.2d 217, (D.C. Cir. 1930), *Aff'd* 283 U.S. 414; *Wilbur v. U.S. Ex Rel. Pyron.* 46 F.2d 224, (D.C. Cir. 1930), *Aff'd* 283 U.S. 414; *Stockley v. U.S.,* 271 F.632, (5th Cir. 1921), *Rev'd on other grounds,* 260 U.S. 532; *see also* Executive Order No. 9337, "authorizing the Secretary of the Interior to withdraw reserve lands of the public domain other lands owned or controlled by the United States " (April 24, 1943) (superceded by Executive Order No. 10355 (May 26, 1952)).

Thus, the Secretary was expressly authorized to create the Power Site withdrawals contested by Donnelly and Lee.

Donnelly and Lee contend that, even if the 1925 and 1950 orders validly withdrew the lands, they described from entry, once the Federal Power Commission issued its "no-injury" determination in 1952, those lands automatically became open to public entry.

They argue that Section 24 of the Federal Power Act, 16 U.S.C. Section 818, expressly required the secretary to open the lands contained within the two Power Site With-

drawals to entry after the Federal Power Commission issued its determination, and that, in effect, "what the statute require[d] the secretary to do 'should be regarded as having been done.' " *Buch v. Morton,* F.2d 600, (9th Cir. 1971).

To support this argument, Donnelly and Lee cite *Reeves v. Andrus,* 465 F. Supp. 1065 (D. Alaska 1979), where a court of this district held that once the Federal Power Commission makes a "no-injury" determination regarding a particular Power Site Classification, the Secretary of the Interior is required to modify the Power Classification and restore the lands to public entry within a reasonable time, unless he identifies some other basis for withdrawing them. *See Reeves v. Andrus,* at 1070.

I can't accept this contention. Although the statutory language of Section 24 appears to indicate that the secretary was required to undertake certain actions, the provision is not "self-executing"; it explicitly "contemplates action by the Secretary to terminate the [withdrawal] classification." *Buch,* 449 F.2d at 607.

In *Buch v. Morton,* 449 F.2d 600 (9th Cir. 1971), the Ninth Circuit rejected an argument, similar to that raised by Donnelly and Lee, that because the Recreation and Public Purposes Act of 1954, 43 U.S.C. Sections 869-869-4 (1982) required the secretary to restore lands that had been previously withdrawn under the public land laws within 18 months if certain conditions were not fulfilled, courts should deem the withdrawal to be "automatically terminated after 18 months" even if the Secretary had failed to act. *See Buch* at 607.

The Ninth Circuit concluded "that if Congress had intended to make the provision self-executing it could have said so, and probably would have." As an example, it cited the language contained in Section 4 of the Multiple Use Act of 1964, 43 U.S.C. Section 1414 (authority terminated on or before June 30, 1970), where Congress had "de-

clare[d] in unambiguous terms that if land is not offered for sale or other disposal under the act, 'the segregative effect shall cease at the expiration of two years from the date of publication.' " *Buch,* 449 F.2d at 607.

In light of this analysis, I conclude that Section 24 of the Federal Power Act explicitly entrusted the Secretary with the responsibility of restoring withdrawn lands to public entry following a no-injury determination, and did not give this responsibility directly top the Federal Power Commission. *See* 33 Op. Atty. Gen. 34 (1921) ("it is clear, therefore, that the Federal Power Commission is not given authority wholly to abolish water-power reservations made by the President.")

Moreover, even the decision in *Reeves* contemplates that the Secretary may decide to retain lands in a withdrawn status for some other purpose even after a "no-injury" determination has been made. *See Reeves,* 465 F. Supp. at 1070.

The proper remedy for Donnelly and Lee, when their entries were rejected, would have been to sue under the Administrative Procedures Act and to require the Secretary either to restore the lands to public entry or to articulate some other basis for preserving the withdrawals. Because Section 24 is not self-executing, the lands contained in Power Cite Classifications 107 and 399 could not have been restored to public entry without an express order issued by the Secretary.

Moreover, as has been previously stated, had such an order been issued, the State of Alaska would have been entitled to the first-preference rights based upon Section 6 of the Statehood Act, and qualified veterans would have had a superior right to other claimants, such as Donnelly and Lee.

For all of these reasons, I conclude that the lands sought by Donnelly and Lee in Power Site Classifications 107 and

399 were validly withdrawn from public entry by the Secretary in 1925 and 1950, and were never restored to entry.

I conclude that Donnelly and Lee did not "occupy" the lands at issue in these actions as that term is defined and used in the Alaska Native Claims Settlement Act Section 14(c)(1). The contested lands were all withdrawn from public entry by 1950, prior to the time that Donnelly and Lee settled upon them, and they were never restored to public entry. Donnelly's and Lee's mere physical presence upon these lands on or prior to December 18, 1971 was not sufficient to obtain for them rights under Section 14(c)(1).

I, therefore, dismiss Donnelly's and Lee's Section 14(c)(1) claims and grant summary judgment to Eklutna.

Eklutna is to order out this transcript, which will resolve the pending summary judgment motions.

The management clerk is to immediately notify the contending parties of this decision.

[End of findings of fact and conclusions of law.]

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH F. DONNELLY, Defendant.	Case No A75-[redacted] Civil MEMORANDUM AND ORDER
JOSEPH F. DONNELLY, Third-Party Plaintiff, vs. SECRETARY OF THE INTERIOR DIRECTOR, BUREAU OF LAND MANAGEMENT, and EKLUTNA, INC., Third-Party Defendants.	

On November 5, 1982, I issued a memorandum decision dismissing for lack of subject-matter jurisdiction Donnelly's counterclaims against the United States and his third-party claims against the federal defendants and Eklutna, Inc. That decision was issued prior to the United States Supreme Court's opinion in *Block v. North Dakota*, 461 U.S. 273 (1983), which analyzed the scope of the federal Quiet Title Act (QTA), 28 U.S.C. § 2409a (1982), and its relationship to other statutes under which parties might seek to secure patent or quiet title to federal public lands. It also preceded my opinion in *Lee v. United States*, 629 F. Supp. 721 (D. Alaska 1985), which applied *Block*'s analysis in a factual context very similar to Donnelly's situation.

Having reviewed the pleadings in this action, along with the *Block* and *Lee* opinions, I hereby amend the November 5, 1982 memorandum decision adopting the analysis contained in *Lee*[1] and otherwise supplementing the memoran-

[1] The November 5, 1982 memorandum indicated that Donnelly's claims against the United States and his claims challenging the issuance of patent to Eklutna were dismissed "with prejudice." However, because my dismissal of those claims was based upon lack of subject-matter jurisdiction, they should have been dismissed *without prejudice*. *See generally Lee v. United States*, 629 F. Supp. 721, 733-34 (D. Alaska 1985) (suggesting that individuals who have brought claims to acquire patent to ANCSA-conveyance lands from the federal government and native corporations are barred for lack of subject-matter jurisdiction may nevertheless be entitled to bring inverse condemnation actions against the United States in the United States Claims Court).

Moreover, the November 5, 1982 memorandum suggests that all Donnelly's claims against Eklutna were dismissed for lack of subject-matter jurisdiction. In fact, that memorandum addressed only Donnelly's *first* cause of action against Eklutna, which challenges the validity of Eklutna's patent to the 92.5 acres at issue in this action. This supplemental memorandum addresses and rejects Donnelly's third cause of action against Eklutna, based upon the equal protection and due process clauses of the Constitution. *See infra*. I have already rejected Donnelly's second cause of action against Eklutna, based upon section

dum decision in accordance with this memorandum and order. Based upon that analysis, Donnelly's counterclaims against the United States and third-party claims against the federal defendants were properly dismissed for lack of subject-matter jurisdiction. *See id.* at 726-27, 732-33 & n.11. The United States disclaimed all interest in the 92.5 acres at issue in this action when it conveyed that land to Eklutna in 1979, *see* 28 U.S.C. § 2409a(d) (1982); *Lee,* 629 F. Supp. at 726, and even without such a disclaimer, Donnelly's claims would be barred under the QTA's twelve-year statute of limitations, since he "knew or should have known of the claim of the United States" to the contested land at least by 1958, when the BLM rejected his homestead entry, or by 1961, when the BLM issued its survey covering the contested land and published notice of the survey in the Federal Register. *See* 28 U.S.C. § 2409a(f); *California v. Yuba Goldfields, Inc.,* 752 F.2d 393, 396-97 (9th Cir. 1985); *Guam v. United States,* 744 F.2d 699, 700-01 (9th Cir. 1984); *Lee,* 629 F. Supp. at 727; *McIntyre v. United States,* 568 F. Supp. 1, 4 (D. Alaska 1983).

Moreover, Donnelly's first cause of action against Eklutna, challenging the validity of the patent Eklutna received to the contested land based upon various common-law theories and sections 14(g) and 22(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1613(g), 1621(b) (1982), was also properly dismissed for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. See *id.* at 728-732. As I held in *Lee,* individuals like Donnelly cannot assert claims to ANCSA-conveyance lands based upon common-law theories, since Congress intended ANCSA to "occupy the field" concerning claims to those lands, and to preempt any common-law theories or other statutory claims

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14(c)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1614(c)(1) (1982), in an oral decision, and will issue a separate written decision detailing my reasons for doing so.

that individuals might assert. *Id.* at 728-29. Furthermore, Donnelly has failed to state a claim against Eklutna based upon ANCSA Section 14(g), since his claim to the contested land is based upon the homestead laws and not one of the property interests enumerated in section 14(g). *See id.* at 731-32. Nor has he stated a claim against Eklutna based upon ANCSA section 22(b), since that provision establishes duties only on the part of the Secretary of the Interior, and not on the part of native corporations.[2] *See id.* at 732. Thus, Donnelly's first cause of action was properly dismissed in the November 5, 1982 memorandum decision.

Donnelly has alleged as his third cause of action against Eklutna that his constitutional rights to equal protection and due process were violated by the "unequal treatment" that he and Eklutna received regarding the contested 92.5 acres. In particular, Donnelly notes that his homestead claim to the contested land was rejected because the land had been withdrawn as part of two powersite classifications, but that ANCSA ultimately authorized the land to be patented to Eklutna "without regard to its [withdrawn] status."

Donnelly's constitutional claims are plainly without merit. To the extent that these claims are directed against Eklutna, as he has pled them, I flatly reject them, because the equal protection and due process clauses of the fifth and fourteenth amendments apply only to the federal government, states, and their agents and instrumentalities—not to purely private entities like Eklutna. *See Fidelity*

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[2] As I held in *Lee*, Donnelly can assert an ANCSA section 22(b) claim only against the Secretary, and such a claim would have to be brought under the QTA. *Lee*, 629 F. Supp. at 732. Since Donnelly's claims under the QTA are barred because the United States has disclaimed interest in the contested lands and because of the QTA's twelve-year statute of limitations he has no basis to bring a section 22(b) claim against the Secretary. *Id.* at 732-33.

Financial Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1435 (9th Cir. 1986); *International Olympic Committee v. San Francisco Arts & Athletics,* 781 F.2d 733, 736-37 (9th Cir.), *amended,* 789 F.2d 1319, 1320, *cert. granted,* 107 S.Ct. 312 (1986); *Rank v. Nimmo,* 677 F.2d 692, 701-02 (9th Cir.), *cert. denied,* 459 U.S. 907 (1982); *Ginn v. Mathews,* 533 F.2d 477, 479 (9th Cir. 1976).

To the extent that Donnelly intended to bring his equal protection and due process claims against Congress, the Secretary, or the BLM, rather than Eklutna, I also reject them. In enacting ANCSA, Congress had a rational basis for permitting native village corporations like Eklutna to select public lands that had previously been withdrawn from entry: it was seeking to achieve a comprehensive resolution of the issues relating to Alaska native land claims, and needed to make available large quantities of public lands for selection by village corporations, preferably in the vicinity of their villages, so that Alaska natives would consent to the extinguishment of their claims of aboriginal title. *See* 43 U.S.C. §§ 1601(b), 1603, 1610(a), 1611(a)-(b); H. Conf. Rep. No. 746, 92nd Cong., 1st Sess. 1, 34 (1971), *reprinted in* 1971 U.S. Code Cong. & Admin. News 2192; *Lee,* 629 F. Supp. at 728-29. I cannot conclude that Congress's decision to make certain lands available for selection by native corporations, even if they had not previously been open to entry by homesteaders like Donnelly, was sufficiently unreasonable to violate Donnelly's equal protection and due process rights. *See Lyng v. Castillo,* 106 S. Ct. 2727, 2730-32 (1986); *Bowen v. Owens,* 106 S. Ct. 1881, 1886 (1986); *Tony and Susan Alamo Foundation v. Secretary of Labor,* 105 S. Ct. 1953, 1964 n.32 (1985); *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.,* 470 U.S. 451, 476-78 (1985); *see also Ramstad v. Hodel,* 756 F.2d 1379, 1383 (9th Cir. 1985).

Moreover, I cannot conclude that the Secretary's and the BLM's rejection of Donnelly's homestead claim to the

contested 92.5 acres, on the ground that those lands had already been withdrawn for powersite purposes when he settled upon them, was so irrational or discriminatory as to violate Donnelly's equal protection or due process rights. *See Tony and Susan Alamo Foundation,* 105 S. Ct. at 1964 n.32; *see generally Regents of University of Michigan v. Ewing,* 106 S. Ct. 507, 514-15 & n.13 (1985). In rejecting Donnelly's claim during the late 1950s and up until the enactment of ANCSA, the Secretary and the BLM were merely applying a firmly established legal principle: that lands withdrawn for powersite development or other purposes under the Pickett Act, 43 U.S.C. § 141 (repealed 1976), are not open to entry under the public land laws, and individuals cannot acquire any rights to those lands by settling upon them. *See Jones v. United States,* 195 F.2d 707, 709 (9th Cir. 1952); *United States v. Anderson,* 113 F. Supp. 1, 2 (D. Alaska 1953), *aff'd* 218 F.2d 780 (9th Cir. 1955); *see also Udall v. Tallman,* 380 U.S. 1, 22 (1965); *Akootchook v. United States Department of the Interior,* 747 F.2d 1316, 1320 (9th Cir. 1984); *Bleamaster v. Morton,* 448 F.2d 1289, 1291 & n.1 (9th Cir. 1971); *Wisenak, Inc. v. Andrus,* 471 F. Supp. 1004, 1009 (D. Alaska 1979); S. Rep. No. 2696, 84th Cong., 2d Sess. ———, *reprinted in* 1956 U.S. Code Cong. & Admin. News 4204 (noting that prior to 1956, the "consistent administrative interpretation" of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1—270-3 (repealed 1976), had been that individuals could select allotments "only from vacant, unappropriated, and unrecorded land").

In continuing to reject Donnelly's claim following ANCSA's enactment in 1971, the Secretary and the BLM reasonably concluded that Congress did not intend in ANCSA to change this long-standing rule concerning the availability of withdrawn lands for settlement. Nothing in ANCSA's language or legislative history suggests that Congress intended to provide "amnesty" to individuals like Donnelly who had settled on withdrawn lands, or to open lands to

settlement by individuals that had previously been withdrawn from entry. When Congress recently authorized individuals to apply for native allotments under the Alaska Native Allotment Act on lands that they had used and occupied while those lands were withdrawn for powersite purposes, it considered it necessary to amend ANCSA and add a provision explicitly authorizing this. *See* 43 U.S.C. § 1634(d) (1982). Yet, there is no analogous provision in ANCSA providing lands to individuals like Donnelly who sought to establish homesteads in powersite withdrawals. Thus, it was logical for the Secretary and the BLM to conclude that ANCSA did not "validate" Donnelly's entry upon previously withdrawn lands.

Moreover, ANCSA sections 11(a) and 12, 43 U.S.C. §§ 1610(a), 1611(a)-(b) (1982), provided that lands contained in powersite withdrawals were to remain withdrawn from appropriation under the public land laws, and were to be available for selection by native village corporations. *See* 43 U.S.C. § 1610(a)(1) (public lands surrounding villages are withdrawn for purposes of village selection, except for two categories of land expressly mentioned: "lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Number [ ] 4"); 43 U.S.C. § 1611(a)-(b). As a result, the Secretary was required, based upon ANCSA's plain language, to patent the contested lands to Eklutna, even though they had not been available for settlement prior to ANCSA's enactment. For all these reasons, the alleged disparity in the federal government's treatment of Donnelly and Eklutna vis-a-vis the contested 92.5 acres did not constitute an equal protection or due process violation. *See Ramstad,* 756 F.2d at 1383.

Donnelly's only remaining claim that has not been addressed in the November 5, 1982 memorandum decision or this supplemental memorandum is his second cause of action against Eklutna, in which he claims that Eklutna is required to convey him title to the surface estate of the

contested 92.5 acres based upon ANCSA section 14(c)(1), 43 U.S.C. § 1613(c)(1) (1982). I have already rejected this claim in an decision, placed of record November 13, 1986.

Eklutna shall prepare, serve and file a final order, disposing of all claims raised in this protracted litigation.

DATED this 5 day of December, 1986, at Anchorage, Alaska.

/s/ JAMES M. FITZGERALD
JAMES M. FITZGERALD
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

UNITED STATES OF AMERICA	)	No. A75-027 Civil
	)	
vs.	)	
	)	
JOSEPH F. DONNELLY,	)	
	)	
vs.	)	
	)	
EKLUTNA, INC.	)	
	)	
	)	

HONORABLE JAMES M. FITZGERALD,
JUDGE PRESIDING

SUBJECT: Findings
DATE: Thursday, February 5, 1981
TIME: 2:30 p.m.

PROCEEDINGS

This is in A75-27 Civil. At the outset serious jurisdictional issues were raised in this litigation. I ordered the case to trial in order that a full record might be developed which might prove helpful in resolving the difficult jurisdictional issues. After trial in which the parties were afforded an opportunity to present such evidence as might seem to them appropriate I informed the attorneys that I would make findings on the factual issues which were presented and, thereafter, schedule a final argument at which time the jurisdictional issues would be thoroughly explored. These, then, are the findings following the evidentiary hearing:

Joseph F. Donnelly first came to the Territory of Alaska under military orders. Although he had a large family he brought his wife and children to Alaska. He and his wife then decided to raise the family in Alaska and subsequently formed the desire to take up a homestead.

Donnelly's first efforts came to naught when his claim was found to be in a mineral reservation and was rejected. However, in the fall of 1956 he found a location which suited him in the Eagle River valley about fourteen miles from Anchorage. His location was then seven to eight miles from the nearest public road.

At the Anchorage Land Office he was furnished with a form containing instructions and listing the requirements for filing a homestead on unsurveyed land. In keeping with the instructions, Donnelly established the boundaries on his claim by metes and bounds and he marked the corners. Donnelly was also told at the Anchorage Land Office that his location must be more than one-fourth of a mile from Eagle River because of a Federal Power Site Classification. After making his location, Donnelly penciled in approximate boundaries of his claim on a Bureau of Land Management map at the Land Office. He was then directed to the office of the cadastral engineer so that the legal description of his claim might be established as that description should appear when the lands were surveyed.

After Donnelly obtained the legal description, his wife prepared a Notice of Location of Settlement or Occupancy claimed in Alaska. The claim was filed on April 22, 1957 as Anchorage Serial 034170. The legal description given was the S 1/2 of the NE 1/4, N 1/2, SE 1/4, containing 160 acres in Sec. 25, Township 14 N, R 1 W, Seward Meridian. According to the record of the land office in Serial 034170 the land office requested a report from the survey office on May 2nd on the status of the land within Donnelly's claim. The survey office on May 9th noted that the land was entirely within Power Site Classification 399

established March 29, 1950. In his report to the land management office, the director of the geological survey on June 20, 1957 reported that Anchorage Serial 034170 was apparently in conflict with Power Site Classification 107 established June 6, 1925, as well as conflicting with Power Site Classification 399. In relevant part, the report reads as follows:

> "A portion of the above land is apparently within a waterpower withdrawal. Power Site Classification 107, June 6, 1925 withdrew 'all unsurveyed lands within one-fourth of a mile of Eagle River' through several townships, including T. 14 N., R. 1W. Power Site Classification 399, March 29, 1950, withdrew 'All unsurveyed land adjacent to Eagle River and tributaries at an altitude of less than 500 feet above sea level and not reserved by Power Site Classification 107' in the foregoing as well as other townships. Projection of the land net onto the Corps of Engineers Eklutna Quadrangle ~~indicates that~~ a portion of the $N^1/_2SE^1/_4$ Sec. 25 is very likely below the 500 foot contour whereas it appears that the $S^1/_2NE^1/_4$ is well above the 500 foot contour."

Thus, it appears that Federal Power Site Classification 107 created June 12, 1925 reserved all unsurveyed lands within a quarter of a mile of Eagle River. Subsequently, Federal Power Site Classification 399 of March 29, 1950 supplemented Classification 107 and reserved all unsurveyed lands at an altitude of 500 feet or less adjacent to Eagle River and to its tributaries.

A request under date of January 25, 1952 from the Regional Administrator, Region 7, Bureau of Land Management at Anchorage for determination under Section 24 of the Federal Power Act, as amended, was forwarded to the Chairman of the Federal Power Commission through the Chief of the Branch of Land Use and Disposal, Division of Lands, on February 25, 1952. According to the Regional

Administrator, once the Section 24 determination was made by the Federal Power Commission, the Bureau of Land Management proposed to classify the land as valuable for lease or disposal under the Small Tract Act of June 1, 1938, the Public Sale Act of August 30, 1949, and other applicable land laws. The Regional Administrator advised that definite plans had been formulated by the Bureau for the disposal of the land as soon as restoration was effected in order to allow settlement.

The Federal Power Commission responded to the request of the Regional Administrator by issuing on November 5, 1952 a Section 24 no injury determination, subject to the stipulation that any improvements placed on reserved lands which should in the future interfere with power development must be removed or relocated by the occupant.

Following the Section 24 determination, the Assistant Chief, Division of Land Planning, Anchorage Land Office, then L. T. Main, sent a memorandum December 11, 1952 to the Regional Chief, Division of Land Planning, pointing out that a no injury determination affecting Power Site Classifications 107 and 399 had been made. The no injury determination applied to some lands in the military reservations close by Eagle River and some unsurveyed lands upstream from the military reservations. In fact, some of the lands were claimed by homesteaders and in order to avoid veterans' preference claims upon restoration, that a "quiet" restoration order ought to be written for the lands in conflict. At a later date a field examination might be made and after a determination if any of the subject lands had a higher use than for homesteads, the balance of the land could be restored with proper publicity.

Restoration Order No. 2 was published in the Federal Register on March 20, 1953 and affected parts of Sections 9, 10 and 16 of T15 N, R 1 W, amounting to 289.57 acres.

The efforts by the Manager, Anchorage Land Office, continued to obtain restoration of additional land within the Power Site Classifications. The manager on October 24, 1955 wrote to the Chief, Division of Lands and Minerals, on the subject. In his memorandum the manager advised that settlers had taken up surveyed sections but the location notices were conditionally accepted for exclusion of any lands which might be found to be within the power site reserves. Since a partial plat had been prepared, he suggested that restoration of the lands should be accomplished concurrently with the filing of the plat.

There was apparently no response to the manager's October 24, 1955 memorandum. So the Operations Supervisor, Anchorage Land Office, on July 16, 1956 directed a second memorandum on the same subject to the Director of Bureau of Land Management, calling attention to the earlier memorandum of October 24th. The director responded by a memorandum under date of July 30, 1956 stating that plats had been adjusted for both power site classifications and suggesting that publication in the Federal Register could be started, the plats then filed and restoration made.

The Acting Manager, Anchorage Land Office, by memorandum of September 18, 1956 to the Lands and Minerals officer requested that office to prepare a notice of restoration which conformed part of the land involved to the plat of survey. The land office would prepare the notice of the filing of the plat of survey for publication.

In this connection, the Bureau of Land Management does not consider land "surveyed" for the purpose of filing a homestead claim until the survey is officially filed.

Additional lands in Power site Classifications 107 and 399 were restored on June 24, 1957.

Virgil Seizer, then manager of the Anchorage Land Office, caused notice of the filing of the plat aggregating

4,145.88 acres by the Bureau of Land Management and the Anchorage Land Office July 30, 1957. The plat involved all of Sections 9, 16, 19, 20, 21, 22 and part of Section 15 in T14 N, R 1 W. Since the Donnelly homestead was in Section 25 of T14 N, R 1 W, the filing of the plat did not affect his location. Indeed, concurrently with the filing of the plat only 360 acres of land within Power Site Classification 107 was restored to disposal under the Public Land Laws. An additional 80 acres within Power Site Classification 399 was restored to entry. Of the remaining land within the plat, 360 acres was reserved for the Territory of Alaska as a school section. And an additional 1,116.21 acres within Power Site Classifications 107 and 280 acres within Power Site Classification 399 were withdrawn for power purposes.

Donnelly on October 21, 1957 provided notice to the land office that he had established a residence on his claim. By this time a pioneer or homesteaders' road had been constructed by homesteaders including Donnelly, and he was able to take a four-wheel drive vehicle to his claim. The First building he placed on the land as a residence was built of packing crates. He obtained water from a nearby stream; he installed a wood stove and furnished the cabin with Coleman lamps and candles.

On November 1, 1957 L. T. Main, then Operations Supervisor, directed a memorandum to the Lands and Minerals Officer concerning the restoration of lands reserved by Power Site Classifications 107 and 399. He states in his memorandum:

> "Attached hereto is L&M field file for Federal Power Commission lands at Eagle River. You will note that part of the lands were restored under restoration order No. 2 of March 20, 1953. In addition more lands were restored on June 24, 1957 as per copy of order attached.

"As far as I know these are the only restorations of power site classifications at Eagle River. However, research may prove me wrong.

"Restoration of the balance of the lands pursuant to determination DA-59-Alaska of November 4, 1952 has been delayed for various reasons most of which appeared justifiable at the time. However, settlement pressures exist. There may be a small part of the lands that are held under a classification order and provision should be made for the proposed enlargement of the Eagle River campground, if such has not already been accomplished.

"Action should be taken immediately to restore all lands still held under the subject orders, I am presuming that the Territory will be anxious to acquire the lands pursuant to the Mental Health Act.

"Mr. Griffith is now working towards restoration of the lands south of Eagle River where our trespass problem is growing. The Territory should want these lands too and maybe we can make a package deal to them."

In the early months of 1958 Donnelly received an opportunity for employment outside of the Anchorage area. Although he had taken up occupancy of his claim the previous October, his wife and younger children had continued to occupy a house at 6001 Atcheson Street, Nunaka Valley. The Donnellys' youngest child had a serious health problem and a physician advised that life on the homestead wasn't suitable for the child. Since it was necessary that residence be maintained on the homestead, it now became possible for Mrs. Donnelly to bring the younger children, including the ailing child, to the homestead. IN late March she and the remaining children moved from the Nunaka Valley home to the claim and Donnelly left to follow up his employment opportunity.

Although unknown to the Donnellys, the manager of the Anchorage Land Office had on November 14, 1957 issued his decision closing out the Donnelly claim. Although the manager's decision was sent by certified mail, with return receipt requested, to the proper address in Nunaka Valley, the letter was returned unclaimed to the land office following a second effort of delivery by the post office. The file reflects as well that no reply was received to the mailed first notice by the land office.

Shortly after her husband departed to work Mrs. Donnelly was informed by a neighbor that he had been told at the land office that the Donnelly homestead was abandoned. Mrs. Donnelly promptly made an inquiry at the land office, and she places the time as late in April or in early May. A memorandum to the file reflects that she was at the land office on April 25, 1958. The memorandum noted that Mrs. Donnelly stated that she did not receive the closing decision of the manager, and a copy of that decision was personally now given to her.

After learning that Anchorage 034170 had been closed out, Mrs. Donnelly inquired at the land office what could be done. The clerk requested someone from a higher management level to see her. She was informed by that unknown person that her only means of renewing the claim was to fill out and submit a new application. Accordingly, she prepared another Notice of Location of Settlement or Occupancy in Alaska and sent it to her husband for his signature. This claim was filed May 2, 1958 at the Anchorage Land Office as Serial No. 043097. The legal description of the location remained the same as on the original filing, but the post office address on the second filing was given as Star Route, Mile 14, Anchorage, Alaska.

A status report in the file of Serial 043097 reflected that the entry was placed on the Eagle River status map November 13, 1958 and a conflict existed to approximately 130 acres of Power Site Reserve 399. The director of the

geological survey reported by memorandum on December 5, 1958 to the manager of the Anchorage Land Office:

> "A portion or all of this tract may be within a waterpower withdrawal. Power Site Classification No. 107, June 6, 1925, withdrew unsurveyed lands within one-quarter of a mile of the Eagle River, and Power Site Classification No. 33 (sic 399), Mar. 29, 1950, withdrew all unsurveyed lands at an altitude of less than 500 feet above mean sea level exclusive of those withdrawn by P.S.C. No. 107. Projection of land lines on the Anchorage quad. map, Reconn. series, indicates that a portion or all of the tract probably is within the limits of these classifications."

Meanwhile, Mrs. Donnelly, having learned that the Power Site Classification conflicted with the Donnelly homestead application, petitioned the Federal Power Commission by letter of May 7, 1958 to restore the lands to entry under the homestead laws. The Federal Power commission responded by letter under date of November 26, 1958 informing her of the November 4, 1952 Power Commission no injury determination allowing the Bureau of Land Management to restore the land for public entry. The relevant part of the letter reads as follows:

> "Portions of these lands were withdrawn in Power Site Classification No. 107, approved June 12, 1925, and in Power site Classification No. 399, dated March 29, 1950. A favorable determination was made on November 4, 1952, in the matter docketed DA-59 Alaska by the Commission with respect to, inter alia, the unsurveyed lands in T. 14 N., R.1 W., withdrawn as above stated. Subsequently, the Bureau of Land Management restored to entry certain surveyed tracts which were covered by the determination, but this restoration did not extend to unsurveyed lands. The restoration order was published March 26, 1953, in

18 Fed.Reg. 1706, amended by notice published April 23, 1953, in 18 Fed.Reg. 2376.

"Consequently, this Commission has taken all necessary action required of it in connection with the power withdrawals. Actual restoration, presumably suspended because of the unsurveyed status of the lands, is a function of the Bureau of Land Management and for that purpose it is suggested you again inquire at the anchorage office."

Mrs. Donnelly then sought help through political channels. She wrote on July 23, 1958 to then Delegate E. L. Bartlett requesting assistance in conjunction with the Donnellys' homestead claim. Delegate Bartlett made inquiry of the Bureau of Land Management on behalf of the Donnellys and homesteaders James Lees. The director of the Bureau of Land Management on August 18, 1958 responded to Delegate Bartlett's letter:

"Dear Mr. Bartlett:

"Your letter of August 12 referred to the settlement by the James W. Lees and the Joseph Donnellys on a power-site reserve near Anchorage, Alaska.

"In the absence of special legislation, we know of no way of assuring the Lees and Donnellys of continued occupancy of the lands for homestead purposes. Any settlement on power-site lands which have not been opened to entry is a trespass against the United States and no rights can be gained thereby. Revocation of the power-site reserve would not necessarily result in their securing rights to the land since existing law grants to Alaska a first preference right of selection and to veterans a secondary preference right of settlement or entry upon the revocation of withdrawals. Although we might be able to make provision in the opening order for some reimbursement by those that acquire the lands for improvements which cannot be

removed, we could not grant the Lees and Donnellys a preference right of entry."

Contemporaneously with these developments, Alaska was in the transition from territorial status to statehood. Under the Admissions Act the new state was entitled to select 102,550,00 acres of land from the public domain which land was required to be vacant, unappropriated and unreserved (Sec.6(b), Public Law 85-508, (72 Stat. 339), July 7, 1958).

Subsection 6(g) of the Statehood Act provides in relevant part:

> "Except as provided in Subsection (a),"—not relevant here—"all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection. . . . . The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation."

So it is clear that under the Statehood Act any lands within the power site reserves which should be restored

were subjected to a first right of preference on behalf of the State of Alaska.

Mrs. Donnelly again wrote Senator Bartlett on January 24, 1959. In her letter Mrs. Donnelly referred to a visit she had made to the Anchorage Land Office. She had been told there that in the event of restoration of Power Site Classification 399 to public entry, not only would a veterans' preference apply to the restored lands but the state would also have a preference right. She mentioned in her letter to Senator Bartlett that additional filings for homesteads were occurring in the land surrounding the Donnelly location. A group of Eagle River homesteaders, including the Donnellys, submitted a petition to Secretary of Interior Fred Seaton on February 8, 1959. In their petition the homesteaders related that they had been informed by the Anchorage Land Office that they stood to lose all their land below the 500 foot elevation because of the power site reserve. The homesteaders complained that the land office was offering inconsistent information and requested the Secretary to clarify the status of their claims. The Secretary responded to the homesteaders' petition in a letter written by Assistant Secretary of Interior Roger Ernst on March 12, 1959:

> "Secretary Seaton has asked us to write to you concerning the petition from the homesteaders of Eagle River Valley which you sent to us. We trust that you will inform the other petitioners of the contents of this letter.
>
> "We are familiar with the Eagle River Valley situation. You no doubt know that the Bureau of Land Management has had a cadastral engineering party in the Valley, for the purpose of determining the 500-foot contour line and the extent of conflicts of homesteads with the powersite reserve and with each other. You may also know that Senator Bartlett is interested in this matter and that we are keeping in touch with

him.

"We understand that some of you may have received incorrect information as to the powersite reserve. There has been some confusion over the fact that although the Federal Power Commission had indicated that it was no longer interested in the reserve, the reserve had not been opened to entry. Any misinformation is sincerely regretted but the fact remains that any settlement of the reserved lands cannot be recognized under existing law.

"You may rest assured that we are not going to take any arbitrary action. After the cadastral engineering survey is completed, we are going to get a full report on the situation. After we study that report and the records, we will be in a better position to determine exactly what can be done in the circumstances.

"In the meantime, we do not intend to revoke the powersite reserve. If we did that now, we would have to give the State of Alaska a preference right to select the lands and to give veterans of World War II and the Korean Conflict a preference right of application before we could make any other disposition of the lands. We do not want to complicate your position any more than it is. The Land Office Manager, of course, cannot allow any homestead applications for the reserved land until the reserve is revoked.

"We are hopeful that the survey and our studies can be completed in the relatively near future."

In the meantime, on March 2, 1959 Donnelly submitted his final proof for patent on his claim. Then on March 5th the Donnellys were notified by the Chief, Lands Adjudication Unit, Anchorage Land Office, Alfred P. Steger, in a letter that they were in trespass. The letter in relevant part reads as follows:

"The records show that the lands in question are not subject to settlement or occupancy because they have

not been restored from Power Site Classification No. 399 of March 29, 1950. While it is true that the Federal Power Commission made a favorable determination November 4, 1952, DA-59 Alaska, none of the unsurveyed lands have been restored to entry by the Bureau of Land Management, and in all probability no action will be taken to restore them until they have been surveyed. Some of the surveyed lands in township 14 North, Range 1 W., S.M. have been restored.

"You previously filed a homestead location notice, serial number anchorage 034170, for the same lands and were advised that they were not subject to settlement or occupancy.

"In view of the foregoing, any use or occupancy of these lands will constitute a trespass against the United States Government."

The letter concluded by advising that the Donnellys' filing fees were being refunded by separate voucher.

So this notice presumed to close out the Donnellys' homestead fee entry in its entirety since their filing fees were refunded. Donnelly, however, rejected the Bureau of Land Management's tender of his filing fees, and on May 28, 1959 the Chief of the Land Adjudication Unit advised Donnelly in writing that the fees had been deposited into a suspense account pending final action "determined by Senator Bartlett and the Interior Department" on the claim. A handwritten note to the file was entered by Agnes Hampton on August 1, 1960. She reported that Mrs. Donnelly in a visit to the Anchorage Land Office had advised that the Donnellys remained on the claim although their case had been closed on May 28, 1959.

The Federal Power commission gave notice to the Bureau of Land Management that on April 21, 1961 an application for preliminary permit was filed with the Federal Power Commission for Power Project 2296 under Section

24 of the Federal Power Act. The filing effectively withdrew the lands in question.

On March 23, 1961 a Notice of filing of Plat of Survey and Order Providing for Opening of Public Lands was published in the Federal Register, 26 F.R., 2186. Notice was given that effective April 1, 1961 a plat of extension survey would be filed including all of Sections 23 and 25 of T.14 N., R.1 W., S.M. In addition, a determination was made that Power Site Classifications 107 and 399 conform to certain subdivisions, 40-acre minimum aliquot parts, to such plat of survey. All but 40 acres, the $SE^1/_2NE^1/_4$ of Donnellys' claim, remain within Power Site Classifications 107 and 399 and were therefore not open to entry.

Apparently from an unpublished decision of Warner May, then manager of the Anchorage Land Office, on May 9, 1961 Donnellys' claim had been erroneously removed from the land office records creating the impression that the land was open for entry.

Coner Wells had included a part of the land settled upon by Donnelly in Wells' homestead claim filed April 20, 1960. But according to the unpublished decision it was not necessary that the decision be published since Wells relinquished his claim on May 4, 1961.

On May 12, 1961 the manager in the Anchorage Land Office sent a certified letter to Donnelly as to that part of the Donnelly claim not within the power site reserve.

In relevant part, the letter relates:

> "By letter of March 5, 1959, Mr. Donnelly was notified that the $S^1/_2NE^1/_4$, Sec. 25, T. 14 N., R. 1W., S.M. was not subject to settlement or occupancy because the land was embraced in Power Site Classification 399 and his entire claim was erroneously removed from the land office records on March 5,

1959. The letter of March 5, 1959 erroneously failed to describe the $N^1/_2NE^1/_4$, and yet it too was removed from the records.

"Assuming the lands to be open Coner V. Wells, Anchorage 051756, filed a notice of location covering the $SE^1/_4NE^1/_4$, Sec. 25 among other lands claiming settlement of the lands well after the date of claimed settlement by Donnelly. On May 4, 1961 Mr. Wells relinquished his entire claim and therefore there is no longer any conflict with the Wells' claim. However, on the same date an application to enter the lands in the former Wells' claim including the $SE^1/_4NE^1/_4$, Sec.25, was filed by M/Sgt. Forrest L. Doores, Jr. Said application can not be acted upon at present but will be rejected as to the $SE^1/_4NE^1/_4$, Sec.25 on the basis that the records show the lands to be claimed and occupied by Joseph F. Donnelly. M/Sgt. Doores is being notified of this by copy of this letter. Formal action will be taken to notify M/Sgt. Doores as soon as the law permits, there being other actions required to be taken by the Bureau of Land Management.

"Adjustment of the claim or that portion not within the existing power site withdrawals is not being required at this time pending the outcome of further investigations which may result in a more equitable conformance than now of record or delineation of the actual withdrawal line as originally described.

"This notice is not to be construed as granting any rights or concessions to the withdrawn lands as described in the original order of withdrawal, lands as described in the original order of withdrawal, ie., within one quarter mile of Eagle River or below the 500 foot contour interval.

"Upon completion of the necessary investigations a final decision with an appropriate appeal period will

be issued calling for an application to enter on the lands not withdrawn."

Recognizing an error had been made in removing all of Donnelly's claim from the land records. May's letter restored for settlement that part of Donnelly's claim outside of the power site reserve.

On April 17, 1962, Amendment No. 1 to the March 23, 1961 Notice of Filing of Plat of Survey and Order Providing for Opening of Public Lands was filed with the Federal Register and published on April 18, 1962 in 27 Federal Register, 3701. This amendment vacated Paragraphs 3 and 4 of the Notice and replaced in its stead a description of conformation to the power site classification based upon minimum aliquot subdivisions of $2^1/_2$ and 5 acres. This refinement resulted in a determination that 67.5 acres of Donnelly's claim was outside of the reserves, and the remaining amount was withdrawn pursuant to Power Site Classifications 107 and 399 and Federal Power Project 2296 on April 21, 1961.

According to a handwritten memorandum to the file, Donnelly visited the Anchorage Land Office on July 26, 1962 to discuss developments. According to the memorandum, Donnelly was going to protest to the Federal Power Commission against Power Project 2296. The case tile contains a letter from the Power Commission indicating on November 26, 1958 a concurrence at that time to restore the lands when they became surveyed. The power project stops action to restore the lands. If Power Project 2296 is cancelled, action to restore can be taken. Donnelly's case, however, now needs, first, an application to enter; second, a decision conforming the homestead and allowing in part and rejecting in part; then handling conflicting Serial 054395. And it appears that filing should be rejected as to the $SE^1/_4NE^1/_4$ of Sec. 25. First, however, the memo suggests that Serial 043097 should be brought into the office concerning conformance to the survey.

On February 21, 1963 the report of field examinations of the Donnelly's claim was filed. According to the report Donnelly had not complied with the improvement requirements or the cultivation requirements, and final certificate and patent were not recommended. In connection with the conflict of Donnelly's claim with the power site reserves, the report related:

> "A random line traverse was made with chain and compass from the 1/4 S25/S30 brass monument to Donnelly's gate and house. Another stadia rod transit traverse was made from a known point (the section line and road crossing) also to the house and gate thus in effect making a closed traverse. Error of closure was about 15'.
>
> "Donnelly's clearings total 10 acres, plus an additional 1 acre cleared by Lee, an adjoining entryman, which accidentally laps over onto Donnelly's claim, thus making a grand total of 11 acres. However, of this 11 acres, only 0.6 acres of the accidental clearing is above or outside the withdrawn area. Donnelly's cultivation appears good in quality, although somewhat gravelly, and has only a slight slope.
>
> "The Donnelly house is located in the $SW^1/_4NE^1/_4NE^1/_4SE^1/_4$, $2^1/_2$ acre aliquot part-well inside the power site withdrawn area. The house is large (20' x 30' approximately), and substantial although of poor appearance. It is one story and flat-roofed with a concrete floor and is, or was, intended to be the daylight basement for a multi-story house. By reason of its type of construction it is unmovable except by dismantling. At the present time, the improvements are being occupied as a home by the Donnelly family.
>
> **"Conclusions**
>
> "Disregarding the conformance question, Donnelly appears to have amply complied with the intent of the homestead law.

"Basically little if any, of the land in the area of the PSC 107, 399 and Power Project 2296 conformance is truly suitable for agriculture in the modern sense because of thin, and/or, rocky, and gravelly soils, and steepness of slope. The south side of the valley is even less suitable than the north side."

Donnelly notified the land office on June 5, 1963 that he had retained attorney Charles Tulin to represent him. According to minutes prepared July 22, 1963, the manager, Anchorage Land Office, held a meeting with Charles Tulin representing several homesteaders affected by the power site withdrawals at Eagle River. In connection with the Donnelly claim, Land Manager, Warner May, reported:

"Mr. Donnelly has a 160 acre claim of which all but $67\frac{1}{2}$ acres is within the Power Site Classification. All improvements are within the area not available. The house is located almost in the center of a 10 acre tract which must be described as two separate 5 acre aliquot parts as follows:

"T. 14 N., R. 1 W.,S.M.

"Section 25: $W\frac{1}{2}NE\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$ 5 acres
$E\frac{1}{2}NW\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$ 5 acres

"The above area contains 1.0 acre of cultivation. The dwelling is located at an elevation of approximately 412 feet. (It should be noted that disregarding the Power Site Classification, Mr. Donnelly has met the requirements of the Homestead Act.) (See illustrations 5 and 6).

"Mr. Donnelly has a number of arguments which all tend to cloud the issue. He argues something about being told by Land Office personnel that he could not locate on both sides of the Seward Meridian and was therefore forced to locate as he did. He argues that he is beyond one-quarter mile of Eagle River and

> therefore not within Power site Classification 107. (This may be true but he is below 500 foot in elevation which lands are covered by Power site Classification 399 dated March 29, 1950.) As the others did, he argues that he cannot move his house and that he has certain equities that should be recognized. The conformance as it passed through the Charles J. Schroeder entry. Anchorage 040370, was also mentioned."

The chief, Lands Adjudication Unit, Alfred P. Steger met with the Donnellys on September 30, 1963. His memorandum in the file reflects that they were advised—"they" meaning the Donnellys—to file application to enter and homestead 2nd application forms. Also, they were told a legal question exists on moving house and cultivation to open hand after 5 year life of claim expired. (They have not yet placed house and cultivation on the Land outside the reserve.) They were told in the next few days we would advise them if we could allow it or if we must sendjdraft adverse decision and case to Washington for determination under adverse procedures. (He seems willing to put cultivation and cabin outside reserve—but can't move present 10-room house.)

> On October 3, 1963 a note is added:
>
> "We must now write Donnelly as to opportunity to move house and cult, outside reserve."—initialed APS for Alfred P. Steger.

Donnellys once again sought political help from Senator Gruening who promptly intervened on September 27, 1963, requesting no adverse action be taken against Donnelly's claim pending review by the Senator. The State Director of the Bureau of Land Management, Roger Robinson, acquiesced to Senator Gruening's request by telegram of October 3, 1963:

"RE HOMESTEAD ANCHORAGE 043097, JOSEPH P. DONNELLY, EAGLE RIVER, HAS OPPORTUNITY TO PLACE A HOUSE AND ONE-EIGHTH CULTIVATION UPON 67.5 ACRE PORTION OF HOMESTEAD OUTSIDE POWER SITE RESERVE. IF HE CHOOSES TO DO SO AND HOUSE AND CULTIVATION ARE FOUND ACCEPTABLE, HE WILL CONSTRUCTIVELY MEET REQUIREMENTS FOR THE AVAILABLE 67.5 ACRES AND ADVERSE ACTION AS TO THAT PORTION WILL NOT BE NECESSARY. THE IMPROVEMENTS ON THE 92.5 ACRE PART OF HOMESTEAD LYING IN POWER SITE RESERVE ARE IN TRESPASS AND FAVORABLE ACTION ON THAT PART IS NOT POSSIBLE. IF HE CHOOSES TO PURSUE CLAIM TO ALL OF HOMESTEAD AS IT NOW STANDS WITH ALL IMPROVEMENTS INSIDE RESERVE, AN ADVERSE DECISION ON ENTIRE CLAIM WILL BE NECESSARY. IF HE RELINQUISHED ALL PRESENT CLAIM IT APPEARS SECOND ENTRY ON 67.5 AVAILABLE LAND COULD BE FAVORABLY CONSIDERED. MR. DONNELLY HAS BEEN CONTACTED AND ADVERSE DECISION IS SUSPENDED TEMPORARILY PENDING HIS PRESENT CHOICE OF ACTION."

On October 4, 1963 Senator Gruening wrote to the Donnellys:

"With reference to your request for assistance in establishing your homestead claim, I have been informed, by telegram, from the State Director of the Bureau of Land Management that it is possible for you to obtain patent to 67.5 acres of the land included in your claim, this being the portion outside the power site reserve. I know you are very much disappointed in not being able to establish a claim to the entire

acreage on which you have filed; however, it appears there is no possibility of obtaining patent on the part of the land still within the power reserve.

"I have been continually pressing the Federal Power Commission and the Department of Interior (which have joint responsibilities in this area) to release the power site classifications which have caused you and others so much difficulty in establishing homestead claims. I hope it will be possible, eventually, to obtain satisfactory action on this and accomplish the opening of this land to settlement."

In accordance with the requirements that have been made clear to him, Donnelly on October 1, 1963 filed a new homestead application for his location. This, of course, had been required by the Bureau of Land Management since it had been contended that the location which Donnelly had applied for was partially within the power reserve. By certified mail of June 11, 1964, Chief of the Lands Section, Steger, notified Donnelly that part of the location claimed by him was open for settlement. This was followed up by meetings between Donnelly, accompanied by his attorney, Tulin, and Steger, and a confirming letter was sent by the land office July 29, 1964. In the letter Steger suggested the possibility of a later contiguous claim to the disallowed part of Donnelly's claim contingent upon future developments. In relevant part the letter reads:

"This is to confirm our statements that we are able to count the residence time completed on your homestead as "constructive residence", and it is counted as though having been accomplished on that portion of your homestead outside the reserves. "However, since the homestead regulations require that cultivation and a habitable house actually exist on a homestead being carried to patent, it is necessary for our office to require that one-eighth of the acreage of your claim outside the reserves be placed under cultivation

and that a habitable house be placed upon that portion. "To meet the house requirement, either the house in the reserve could be moved to the available land in your claim, or a new habitable structure could be placed thereon.

"As soon as this is done, your notarized statement and the notarized statements of two witnesses to this effect should be filed in our office to supplement your previously filed final proof.* * * * As to that part of your claim inside the power reserves, you are aware that the City of Anchorage applied for and was granted a license by the Federal Power Commission under Power Project No. 2405. In addition, the Power Site Classifications 107 and 399 have not been entirely lifted. If the City proceeds with the power project we will not be able, of course, to acknowledge or allow any claims in the reserve area.

"However, as we indicated in our previous meetings with you, if for any reason the City's project is relinquished or is cancelled by the Federal Power Commission and the power reserves are revoked, and further, if the State does not select the tracts under its preference right authority, we will accept a homestead contiguous additional application from you for that part of your claim formerly in the reserve and immediately adjoining your original entry.

"Mr. Tulin has conferred with Mr. Joe Keenan, Lands Officer, State Division of Lands, and the State indicates that if the Eagle River reserves are opened to entry, it will not select those portions containing improvements inadvertently placed in the reserve. The State will undoubtedly waive its 90 day preference right to select, and your application could be filed."

Donnelly completed the Bureau of Land Management requirements for patent to the 67.5 acres, and on June 25, 1965 finally received a patent from the United States

to that land. Donnelly continued his efforts to obtain a revocation of power site classifications. His position was that since the Section 24 determination by the Federal Power commission the land should have been restored by the Bureau of Land Management. The reasons that the land was not restored are not precisely known although the Anchorage Land Office from time to time pressed for restoration of the entire area of the power site classifications. L. T. Main who was Land Manager during part of this period and was familiar with the problem was of the opinion that partial restorations may have resulted from the Anchorage Land Office request. He gave several reasons why the restoration may not have been accomplished. Trespass may have caused difficulties. Additionally, a survey was believed necessary to determine that part of the lands within the townsites affected by the power site classifications to determine the boundaries and the extent of the reserves. In addition, it might have been believed necessary to classify the lands for a possibility of inclusion in small tracts. Finally, the survey was difficult to obtain since the Bureau of Land Management had other priorities for which surveys were required.

Donnelly, however, continued his efforts to obtain a revocation of the power site classifications. His request was denied and a formal decision was entered by the State Land Office on May 13, 1968 rejecting his application. According to the decision:

> "On July, 1967, Joseph F. Donnelly filed a request that Power Site Classification No. 107 of June 12, 1925 and Power Site Classification No. 399 of March 29, 1950 be revoked insofar as they affect lands in Section 25, T. 14 N., R. 1 W., S.M. "The applicant has a patented original homestead adjoining the reserved land, and he desires to apply for a continguous additional homestead entry in the event the power site reserves were revoked and providing that the State of Alaska did not select the land.

"In addition to the two power site classifications mentioned above, the land involved is also withdrawn by Power Project No. 2405 of September 3, 1963, which resulted from an application by the city of Anchorage for a preliminary permit for a proposed Eagle River project.

"In reply to an application filed with the Federal Power Commission by C.J. McIntyre of Eagle River for elimination of lands in the same area from the power site withdrawals and project, the Commission, on April 17, 1968, issued an Order Denying Application Under Section 24 of the Federal Power Act, Docket No. DA-89 Alaska.

"In its order, the Commission stated that although the preliminary permit issued to the city of Anchorage for Power Project No. 2405 expired on April 30, 1967, and no application for license has been filed, the Greater Anchorage Area Borough had objected to any elimination or modification of the existing withdrawal. The Borough states that the overall planning for the future of the Anchorage area would depend considerably on use of the Eagle River watershed for additional hydroelectric energy, for a domestic water supply source, and for recreational needs.

"The Commission concluded that although development of the Eagle River project is not presently scheduled, such development is being considered, and the power value of the lands lies in their possible use for flowage as once proposed in Power Project No. 2405. Further, the Commission held that revocation of the power withdrawals or restoration of the lands to entry, location, or selection subject to the provisions of Section 24 of the Federal Power Act would place an unnecessary additional financial burden on a future power developer, and the withdrawals on Eagle

River in this area should not be vacated or cancelled.

"Since the findings of the Federal Power Commission indicate a continuing need for Power Site Classifications 107 and 399 and Power Project No. 2405, with the possible future development of this Eagle River area for power purposes, Mr. Donnelly's petition for revocation of the subject withdrawals is hereby denied."

Donnelly appealed the decision of the Chief Lands Adjudicator to the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Washington, D.C. On July 31, 1968 the decision was affirmed.

Finally, Donnelly's appeal to the Secretary of Interior was dismissed September 26, 1968 for want of timely filing.

This completed the administrative review. Since no further action was taken, Donnelly was served with a Notice of Trespass on December 22, 1970. The trespass alleged that he had unlawfully entered upon withdrawn Federal land, substantially altered the character of the land by clearing, excavating and constructing physical structures thereon.

The Alaska Native Land Settlement Claim was enacted December 18, 1971 as Public Law 92-203 (85 Stat. 688). In addition to a grant of $962,500,000 compensation for extinguishment of native aboriginal title, 40,000,000 acres of land was set aside for native regional and village corporations. Section 11 (a) (1) provides in relevant part:

"The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

"(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b);

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection."

And Subsection 11 (b) (1) included among the Native villages subject to this Act Eklutna, Cook Inlet. Eklutna had filed a claim of aboriginal title for the entire Eagle River Valley with the Indians Claim Commission in 1953. This claim was extinguished by the Settlement Act. Earlier, all of the lands in the Eagle River Valley which are relevant to this litigation had been part of the Eklutna reserve and established under the Indian Reorganization Act. The reserve established in 1936 extended up the Eagle River and up the Knik River, and the line was drawn across the top of the mountain ridges to establish the boundaries of the reserve. The reserve included 326,000 acres. In 1912, as World War II began, the reserve was cut down when the militaryjreservations were established at Fort Richardson. Eklutna's entitlement under the Settlement Act amounted to 232,000. However, the Village will be unable to select sufficient lands but must select into the contingency lands established under the Settlement Act. It is unlikely that even if the contingency lands are selected, there will be sufficient lands available for Eklutna to satisfy its entitlement.. Indeed, according to the testimony of Daniel Alex, the Eklutna's land manager, it is probable that in order to satisfy its entitlement, Eklutna would have to select lands above timberline and on the glaciers. Although Eklutna contends that a means exists for resolution of Donnelly's claim under the provisions of Section 14 (c) (1) of the Settlement Act, which provides in relevant part that "the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied

as a primary place of residence. . ." Donnelly has made no application.

In short, the present status of Donnelly's claim to the 92.5 acres which he sought in the power reserve is that at no time was the land opened for entry under the Public Land Laws when he made application. Eklutna now claims the land as part of its entitlement under the Alaska Native Lands Settlement Act, and the United States claims to have no further interest in the matter.

The parties may request in writing additional findings within ten days after obtaining a transcript of these findings.

(END OF FINDINGS)

UNITED STATES OF AMERICA)
)
STATE OF ALASKA)

I, Bonnie M. Adams, Official Court Reporter for the hereinabove-entitled Court, do hereby certify:

That as such Court Reporter, I reported the aforementioned Findings in Cause No. A75-027 Civil;

That I reported said proceedings in Stenograph machine shorthand and thereafter the same was reduced to typewriting by me:

That the foregoing pages numbered 1 through 39 contain a full, true and correct transcript of all the proceedings reported on February 5, 1981.

/s/ Bonnie M. Adams
/s/ BONNIE M. ADAMS

Appendix F

IN REPLY
REFER TO:
ALO:L8
MAY 12, 1961

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
Cordova Building
6th and Cordova
Anchorage, Alaska

Certified Mail
Return Receipt Requested

NOTICE

Joseph F. Donnelly	:	Anchorage 043097
Star Route, Mile 14	:	Homestead 1.1
Anchorage, Alaska	:	

Settlement Claim Accepted as to Lands Not Within Power Site Classifications 107 and 399 and Declared Null and Void as to Remainder

On May 2, 1958, Mr. Joseph F. Donnelly filed a location notice for the $S^1/_2NE^1/_4$, $N^1/_2SE^1/_4$, Sec. 25, T. 14 N., R. 1 W., S.M., claiming settlement of the lands on April 21, 1957.

By letter of March 5, 1959, Mr. Donnelly was notified that the $S^1/_2NE^1/_4$, Sec. 25, T. 14 N., R. 1 W., S.M. was not subject to settlement or occupancy because the land was embraced in Power Site Classification 399 and his entire claim was erroneously removed from the land office records on March 5, 1959. The letter of March 5, 1959 erroneously failed to describe the $N^1/_2SE^1/_4$, and yet it too was removed from the records.

Assuming the lands to be open Coner V. Wells, Anchorage 051756, filed a notice of location covering the $SE^1/_4NE^1/_4$, Sec. 25 among other lands claiming settlement of the lands well after the date of claimed settlement by Donnelly. On May 4, 1961 Mr. Wells relinquished his entire claim and therefore there is no longer any conflict with the Wells' claim. However, on the same date an application to enter the lands in the former Wells' claim including the $Se^1/_4NE^1/_4$, Sec. 25, was filed by M/Sgt. Forrest L. Doores, Jr. Said application can not be acted upon at present but will be rejected as to the $SE^1/_4NE^1/_4$, Sec. 25 on the basis that the records show the lands to be claimed and occupied by Joseph F. Donnelly. M/Sgt. Doores is being notified of this by copy of this letter. Formal action will be taken to notify M/Sgt. Doores as soon as the law permits, there being other actions required to be taken by the Bureau of Land Management.

Adjustment of the claim or that portion not within the existing power site withdrawals is not being required at this time pending the outcome of further investigations which may result in a more equitable conformance than now of record or delineation of the actual withdrawal line as originally described.

This notice is not to be construed as granting any rights or concessions to the withdrawn lands as described in the original order of withdrawal, ie., within one quarter mile of Eagle River or below the 500 foot contour interval.

Upon completion of the necessary investigations a final decision with an appropriate appeal period will be issued calling for an application to enter on the lands not withdrawn.

/s/Warner T. May
Warner T. May
Manager

Copy to :

M/Sgt. Forrest L. Doores, Jr.
5040th Transportation Squadron
Box 3406
Elmendorf AFB, Alaska

Enclosures:
Township Plat
Status Plat

Appendix G

IN REPLY
REFER TO:
ALO:L3
Anch. 043097
Homestead 1.1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
Cordova Building
555 Cordova Street
Anchorage, Alaska

Mr. Joseph F. Donnelly
Mile 14, Glenn Highway, Star Route
Anchorage, Alaska

June 20, 1963

Dear Mr. Donnelly:

We have been processing the homestead filings in the Eagle River Valley Area, and a solution has been attained on most of them.

Your case, identified above, has now been reached for adjudication, however, before taking final action we would like to have the opportunity of discussing the possibilities of a workable solution with you.

Please call the office and let us know when, and if, it would be convenient for you to come in.

We understand that Charles E. Tulin, Attorney-at-Law, is representing you in this matter. If our understanding is correct, please submit a statement to this effect.

Sincerely yours,

/s/Alfred P. Steger
Alfred P. Steger
Chief, Lands Section

Appendix H

IN REPLY
REFER TO:
ALO:L7
Anch. 043097
HE 1.1

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
Anchorage District Office
Federal Building
Fourth and G Streets
Anchorage, Alaska 99051
Jun 11, 1964

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Joseph F. Donnelly
Star Route Mile 6.3
Eagle River Road
Eagle River, Alaska

Dear Mr. Donnelly:

This is to advise you the following described land of your Homestead Claim, Anchorage 043097, are available for settlement:

$SE^1/_4NE^1/_4$, $NE^1/_4SW^1/_4NE^1/_4$, $N^1/_2NW^1/_4SW^1/_4NE^1/_4$, $SE^1/_4NW^1/_4SW^1/_4NE^1/_4$, $N^1/_2SE^1/_4SW^1/_4NE^1/_4$, $SE^1/_4SE^1/_4SW^1/_4NE^1/_4$, $NE^1/_4NE^1/_4NE^1/_4SE^1/_4$, Section 25, T. 14 N., R. 1 W., S.M., containing 67.5 acres.

The lands claimed by you described as the $NW^1/_4SE^1/_4$, $W^1/_2NE^1/_4SE^1/_4$, $SE^1/_4NE^1/_4SE^1/_4$, $W^1/_2NE^1/_4NE^1/_4SE^1/_4$, $SE^1/_4NE^1/_4NE^1/_4SE^1/_4$, $SW^1/_4SW^1/_4NE^1/_4$, $SW^1/_4SE^1/_4SW^1/_4NE^1/_4$, $SW^1/_4NW^1/_4SW^1/_4NE^1/_4$, Section 25,

T. 14 N., R. 1 W., S.M., containing 92.5 acres are not available for settlement under any of the public land laws having been withdrawn, prior to when you first settled, by Power Site Classification No. 107 or Power Site Classification No. 399. This land was further withdrawn under Power Project 2296 on April 21, 1961. Power Project 2296 was vacated by Federal Power Commission order issued July 23, 1963, however the City of Anchorage on September 3, 1963, filed an application for lands, including those described above as being within Power Site Classification 107 or Power Site Classification 399. The City of Anchorage application has culminated in Power Project No. 2405 dated May 11, 1964.

The record shows your house and all of your cultivation was placed in the area of your homestead which, to date, remains withdrawn from settlement. As to settlement on withdrawn lands, it has long been established that such settlement gains no rights for the settler. *Robert L. Miller,* 68 I.D. 81 (1961). That portion of a settlement claim lying within the boundaries of withdrawals not subject to settlement is null and void. *Weston A. Hillman,* A-28158 (February 2, 1960). However, this office has received clearance to permit settlers and/or entrymen, even though the five year life of the claim or entry has expired, to move the house in which they resided or to build another habitable house on the lands available to them, to cultivate one-eighth of the area available to them, and the residence and/or cultivation will be considered constructive and acceptable, all else being regular.

Accordingly, you are hereby given until August 1, 1964, within which to place a habitable house and cultivate no less than 8.4 acres of land within that portion of your homestead available for settlement, and for you to submit a notarized statement and separate notarized statements of two witnesses, attesting to the same.

This letter is to follow up our several discussions with you and your attorney and to confirm the statements made to you at the meetings.

Sincerely yours,

/s/Alfred P. Steger
Alfred P. Steger
Chief, Lands Section

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDGMENT

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, deceased,	)	
Plaintiff-Appellant,	)	No. 86-4428 DC No. A75-27-F No. 87-3834
v.	)	
UNITED STATES OF AMERICA; SECRETARY OF THE INTERIOR; DIRECTOR, BUREAU OF LAND MANAGEMENT and EKLUTNA, INC.	)	
Defendants-Appellee.	)	
JAMES W. LEE,	)	
Plaintiff-Appellant,	)	DC No. CV-79-336
v.	)	
UNITED STATES OF AMERICA; SECRETARY OF THE INTERIOR; DIRECTOR, BUREAU OF LAND MANAGEMENT; EKLUTNA, INC.,; COOK INLET REGION, INC.,	)	
Defendants-Appellees.	)	

APPEAL from the United States District Court for the _____ District of Alaska (Anchorage)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District court for the _____ District of Alaska (Anchorage)

_____

_____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

A TRUE COPY
ATTEST JUL 8 1988
CATHY PATTERSON

Filed and entered June 27, 1988

Appendix J

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THERESE U. DONNELLY, Personal Representative of the Estate of JOSEPH F. DONNELLY, deceased *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR; DIRECTOR, BUREAU OF LAND MANAGEMENT and EKLUTNA, INC., *Defendants-Appellees.*	No. 86-4428 D.C. No. A75-27-F No. 876-3834 D.C. No. CV-79-336
JAMES W. LEE *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA; SECRETARY OF THE INTERIOR; DIRECTOR, BUREAU OF LAND MANAGEMENT, EKLUTNA, INC.; COOK INLET REGION, INC., *Defendants-Appellees.*	

ORDER

The panel amends the opinion filed March 10, 1988 to add the following footnote after the word "trespassers" at the end of the sixth line at page 7594:

> "Counsel for appellant has called to the attention of the court a decision of the Supreme Court of Alaska, *Hakala and Kitchen v. Atxam Corp.* No. 3304, (April 22, 1988), decided after the filing of the decision in this case, that reaches a contrary result."

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has called for an en banc rehearing. Fed. R. App. P. 35(b)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix K

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

ALASKA

Notice of Filing of Plat of Survey and Order Providing for Opening of Public Lands

March 15, 1961.

1. Plat of the extension survey of the lands described below will be officially filed in the Anchorage Land Office, Anchorage, Alaska, effective at 10:00 a.m., April 1, 1961.

Seward Meridian

T. 18 N., R. 1 E.
Sec. 4: All;
Sec. 5: All;
Sec. 9: All;
Sec. 10: $W^1/_2$.

Containing 2,240 acres.

T. 14 N., R. 1 E.,
Sec. 30: Lots 1, 2, $E^1/_2SW^1/_4$, $SE^1/_4$;
Sec. 31: Lots, 1, 2, 3, 4, $E^1/_2NW^1/_4E^1/_2SW^1/_4$, $NE^1/_4$, $SW^1/_4$;
Sec. 32: All;
Sec. 33: All.

Containing 2,220.94 acres.

T. 14 N., R. 1 W.,
Sec. 14: $S^1/_2$;

Sec. 28: All;
Sec. 25: All;
Sec. 26: All;
Sec. 36: All.

Containing 2,880 acres.

2. The land lies in the Eagle River area approximately 20 miles northeasterly from Anchorage.

On each side of the valley are steep mountain slopes, covered with humus stunted timber, dense brush, and broken ledge outcroppings.

The timber is spruce, aspen, birch and cottonwood. The major undergrowth is alder, devil's club, willows, low-bush cranberries, high-bush cranberries, rose-bushes, wild raspberries, currants, and various unidentified plants.

The Eagle River winds down the valley and is fed by the Eagle River glacier at the head of the valley and by numerous small mountain streams.

3. Power Site Classification Number 107, dated June 12, 1925, withdraws all unsurveyed lands lying within $^1/_4$ mile of the Eagle River described by the following subdivisions:

Seward Meridan

T. 13 N., R 1 E.,
Sec. 4: $W^1/_2NW^1/_4$, $SE^1/_4NW^1/_4$, $SW^1/_4$, $W^1/_2$ $SE^1/_4$, $SE^1/_4SE^1/_4$;
Sec. 5: All;
Sec. 9: All;
Sec. 10: $W^1/_2W^1/_2$.

T. 14 N., R 1 E.,
Sec. 30: Lots 1, 2, $E^1/_2SW^1/_4$, $W^1/_2SE^1/_4$, $SE^1/_4SE^1/_4$;

Sec. 31: All;
Sec. 33: $W^1/_2NW^1/_4,SW^1/_4,S^1/_2SE^1/_4$.

T. 14 N., R. 1 W.,
Sec. 23: $S^1/_2NW^1/_4$, $SW^1/_4$, $S^1/_2SE^1/_4$;
Sec. 25: $W^1/_4NE^1/_4,W^1/_2,SE^1/_4$;
Sec. 26: $N^1/_2,E^1/_2SW^1/_4$, $SE^1/_4$;
Sec. 36: $N^1/_2$, $NE^1/_4SW^1/_4,N^1/_2SE^1/_4$, $SE^1/_4$ $SE^1/_4$.

4. Power Site Classification Number 399, dated March 29, 1950, withdraws unsurveyed lands below the 500 foot contour level along the Eagle River, not included in Power Site Classification Number 107, described by subdivision as follows:

Seward Meridian

T. 14, N., R. 1 W.,
Sec. 25: $NW^1/_4SE^1/_4$;
Sec. 26: $NW^1/_4NW^1/_4$.

5. Subject to valid existing rights and the requirements of applicable law, the lands described in paragraph one of this order and not withdrawn by paragraph three, are hereby open to filing of applications, selections and locations in accordance with the following:

a. Applications and selections under the nonmineral public land laws and applications and offers under the mineral leasing laws may be presented to the Manager, Anchorage Land Office, beginning on the date of this order. Such applications, selections and offers will be considered as filed on the hour and respective dates shown for the various classes enumerated in the following paragraph:

(1) Applications by persons having prior existing valid settlement rights, preference rights conferred by existing laws, or equitable claims subject to allowance and confir-

mation will be adjudicated on the facts presented in support of each claim or rights. All applications presented by persons other than those referred to in this paragraph will be subject to the applications and claims mentioned in this paragraph.

(2) All valid applications and selections under the nonmineral public land laws, other than those mentioned under paragraph (1) and applications and offers under the mineral leasing laws presented prior to 10:00 a.m., on June 29, 1961, will be considered as simultaneously filed at that hour. Rights under such applications and selections filed after that hour will be governed by the time of filing.

b. The lands will be open to location under the United States mining laws, beginning 10:00 a.m., on June 29, 1961.

6. Persons claiming preference rights based upon valid settlement statutory preference or equitable claims must enclose properly corroborated statements in support of their applications, setting forth all facts relevant to their claims. Detailed rules and regulations governing applications which may be filed pursuant to this notice can be found in Title 43 of the Code of Federal Regulations.

7. Applications for these lands, which shall be filed in the Land Office at Anchorage, Alaska, shall be acted upon in accordance with the regulations contained in § 295.8 of title 48 of the Code of Federal Regulations to the extent such regulations are applicable.

Applications under the homestead and homesite laws shall be governed by the regulations contained in Parts 64, 65, and 106 of Title 43 of the Code of Federal Regulations.

8. Inquiries concerning these lands shall be addressed to the Manager, Anchorage Land Office, Anchorage, Alaska.

WARNER T. MAY,

Manager.

[F.R. Doc. 61-3549; Filed, Mar. 22, 1961; 8:48 a.m.]

Appendix L

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[Amdt. No. 1]

ALASKA

Notice of Filing Plat of Survey and Order Providing for Opening of Public Lands

April 9, 1962.

In F.R. Doc. 61-2549, appearing on page 2486 of the issue for March 23, 1961, plat of extension survey of land officially filed in the Anchorage Land Office, Anchorage, Alaska, effective at 10:00 a.m., April 1, 1961, paragraph 1, 3, and 4 only are hereby amended as follows:

Paragraph 1. (All land description and acreage remains the same except)

Seward Meridian

T. 14 N., R. 1 E.,

Sec. 30: Lots 3 and 4 of proposed Supplemental plat instead of Lot 1;

Sec. 31: Lots 5 and 6 of proposed Supplemental plat instead of Lot 4.

Par. 3 and 4. (Paragraph 3 and 4 are completely vacated and replaced with the following single paragraph.)

Power Site Classification 107 dated June 12, 1925, and 399 dated March 29, 1950, withdrew all the then unsurveyed lands lying within 1/4 mile of the Eagle River or below the 500 contour of Eagle River drainage. Power Project 2296 dated April 31, 1961, affected the same lands. The area so withdrawn within the surveyed lands which are the subject of this order is now described as follows:

Seward Meridian

T. 14 N., R., 1 W.,

Sec. 23: W^1/$_2$SW^1/$_4$, SE^1/$_4$SW^1/$_4$, W^1/$_2$NE^1/$_4$ SW^1/$_4$, SE^1/$_4$NE^1/$_4$SW^1/$_4$, W^1/$_2$NE^1/$_4$NE^1/$_4$ SW^1/$_4$, SE^1/$_4$NE^1/$_4$NE^1/$_4$SW^1/$_4$, SW^1/$_4$SW^1/$_4$ NW^1/$_4$, S^1/$_2$NW^1/$_4$SW^1/$_4$NW^1/$_4$, W^1/$_2$SE^1/$_4$ SW^1/$_4$NW^1/$_4$, SE^1/$_4$SE^1/$_4$SW^1/$_4$NW^1/$_4$, SW^1/$_4$ SW^1/$_4$SE^1/$_4$NW^1/$_4$, SW^1/$_4$NW^1/$_4$SE^1/$_4$, SW^1/$_4$ SE^1/$_4$,S^1/$_2$SW^1/$_4$SE^1/$_4$;

Sec. 25: W^1/$_2$NW^1/$_4$, SE^1/$_4$NW^1/$_4$, SW^1/$_4$NE^1/$_4$ NW^1/$_4$, SW^1/$_4$NW^1/$_4$NE^1/$_4$NW^1/$_4$, S^1/$_2$SE^1/$_4$ NE NW^1/$_4$, SW^1/$_4$, W^1/$_2$SE^1/$_4$, SE^1/$_4$SE^1/$_4$, W^1/$_2$NE^1/$_4$SW^1/$_4$, SE^1/$_4$NE^1/$_4$SE^1/$_4$, W^1/$_2$NE^1/$_4$ NE^1/$_4$SE^1/$_4$, SE^1/$_4$NE^1/$_4$NE^1/$_4$SE^1/$_4$, SW^1/$_4$ SW^1/$_4$NE^1/$_4$, SW^1/$_4$SE^1/$_4$SW^1/$_4$NE^1/$_4$, SW^1/$_4$ NW^1/$_4$SW^1/$_4$NE^1/$_4$;

Sec. 28: N^1/$_2$, N^1/$_2$SE^1/$_4$, SE^1/$_4$SE^1/$_4$, NE^1/$_4$ SW^1/$_4$SE^1/$_4$, N^1/$_2$NW^1/$_4$SW^1/$_4$SE^1/$_4$, NE^1/$_4$ SE^1/$_4$SW^1/$_4$SE^1/$_4$, N^1/$_2$NE^1/$_4$NW^1/$_4$SW^1/$_4$, SE^1/$_4$NE^1/$_4$NW^1/$_4$SW^1/$_4$, NE^1/$_4$NW^1/$_4$NW^1/$_4$ SW^1/$_4$, N^1/$_2$NE^1/$_4$SW^1/$_4$, SE^1/$_4$NE^1/$_4$SW^1/$_4$, NE^1/$_4$SW^1/$_4$NE^1/$_4$SW^1/$_4$;

Sec. 36: NE^1/$_4$, NE^1/$_4$NW^1/$_4$, N^1/$_2$NW^1/$_4$NW^1/$_4$, SE^1/$_4$NW^1/$_4$NW^1/$_4$, N^1/$_2$SW^1/$_4$NW^1/$_4$NW^1/$_4$, SE^1/$_4$SW^1/$_4$NW^1/$_4$NW^1/$_4$, N^1/$_2$NE^1/$_4$SW^1/$_4$ NW^1/$_4$, NE^1/$_4$SE^1/$_4$NW^1/$_4$, N^1/$_2$NW^1/$_4$SE^1/$_4$ NW^1/$_4$, SE^1/$_4$NW^1/$_4$SE^1/$_4$NW^1/$_4$. N^1/$_2$SE^1/$_4$ SE^1/$_4$NW^1/$_4$, NE^1/$_4$NW^1/$_4$SE^1/$_4$, NE^1/$_4$NW^1/$_4$ NW^1/$_4$SE^1/$_4$, N^1/$_2$NE^1/$_4$SE^1/$_4$, SE^1/$_4$NE^1/$_4$ SE^1/$_4$, N^1/$_2$SW^1/$_4$NE^1/$_4$SE^1/$_4$, N^1/$_2$NE^1/$_4$SE^1/$_4$ SE^1/$_4$, SE^1/$_4$NE^1/$_4$SE^1/$_4$SE^1/$_4$.

T. 14 N., R. 1 E.,

Sec. 30: Lot 2, $S^{1}/_{2}SE^{1}/_{4}SW^{1}/_{4}$, $S^{1}/_{2}NW^{1}/_{4}$ $SE^{1}/_{4}SW^{1}/_{4}$, $NW^{1}/_{4}NW^{1}/_{4}SE^{1}/_{4}SW^{1}/_{4}$, $SW^{1}/_{4}$ $SW^{1}/_{4}SW^{1}/_{4}SE^{1}/_{4}$, Lot 4 of proposed supplemental plat;

Sec. 31: $S^{1}/_{2}NE^{1}/_{4}$, $S^{1}/_{2}NW^{1}/_{4}NE^{1}/_{4}$, $NW^{1}/_{4}$ $NW^{1}/_{4}NE^{1}/_{4}$, $S^{1}/_{2}NE^{1}/_{4}NW^{1}/_{4}NE^{1}/_{4}$, $NW^{1}/_{4}$ $NE^{1}/_{4}NW^{1}/_{4}NE^{1}/_{4}$, $SW^{1}/_{4}NE^{1}/_{4}NE^{1}/_{4}$, $SW^{1}/_{4}$ $SE^{1}/_{4}NE^{1}/_{4}NE^{1}/_{4}$, $E^{1}/_{2}NW^{1}/_{4}$, $E^{1}/_{2}SW^{1}/_{4}$, $SE^{1}/_{4}$, Lot 1, Lot 2, Lot 3, Lot 5 of proposed supplemental plat;

Sec. 32: $SW^{1}/_{4}SW^{1}/_{4}NW^{1}/_{4}$, $SW^{1}/_{4}NW^{1}/_{4}SW^{1}/_{4}$ $NW^{1}/_{4}$, $W^{1}/_{2}SE^{1}/_{4}SW^{1}/_{4}NW^{1}/_{4}$, $W^{1}/_{2}SW^{1}/_{4}$, $W^{1}/_{2}SW^{1}/_{4}NE^{1}/_{4}SW^{1}/_{4}$, $SW^{1}/_{4}NW^{1}/_{4}NE^{1}/_{4}$ $SW^{1}/_{2}$, $W^{1}/_{2}SE^{1}/_{4}SW^{1}/_{4}$, $SE^{1}/_{4}SE^{1}/_{4}SW^{1}/_{4}$, $S^{1}/_{2}NE^{1}/_{4}SE^{1}/_{4}SW^{1}/_{4}$, $SW^{1}/_{4}SW^{1}/_{4}SE^{1}/_{4}$, $SW^{1}/_{4}NW^{1}/_{4}SW^{1}/_{4}SE^{1}/_{4}$, $SW^{1}/_{4}SE^{1}/_{4}SW^{1}/_{4}$ $SE^{1}/_{4}$.

T. 13 N., R. 1 E.,

Sec. 4: $SW^1/_4SW^1/_4NW^1/_4$, $SW^1/_4NW^1/_4SW^1/_4$ $NW^1/_4$, $SW^1/_4SE^1/_4SW^1/_4NW^1/_4$, $W^1/_2SW^1/_4$, $SE^1/_4SW^1/_4$, $W^1/_2NE^1/_4SW^1/_4$, $SE^1/_4NE^1/_4$ $SW^1/_4$, $W^1/_2NE^1/_4NE^1/_4SW^1/_4$, $SE^1/_4NE^1/_4$ $NE^1/_4SW^1/_4$, $W^1/_2SW^1/_4SE^1/_4$, $SE^1/_4SW^1/_4$ $SE^1/_4$, $W^1/_2NE^1/_4SW^1/_4SE^1/_4$, $SE^1/_2NE^1/_4$ $SW^1/_4SE^1/_4$, $W^1/_2SW^1/_4NW^1/_4SE^1/_4$, $SW^1/_4$ $SW^1/_4SE^1/_4SE^1/_4$, $SE^1/_4SW^1/_4NW^1/_4SE^1/_4$;

Sec. 5: $W^1/_2NE^1/_4$, $SE^1/_2NE^1/_4$, $SW^1/_4NE^1/_4$ $NE^1/_4$, $SW^1/_4NW^1/_4NE^1/_4NE^1/_4$, $SW^1/_4SE^1/_4$ $NE^1/_4NE^1/_4$, $NW^1/_4$, $N^1/_2SW^1/_4$, $NE^1/_4SW^1/_4$ $SW^1/_4$, $NE^1/_4NW^1/_4SW^1/_4SW^1/_4$, $NE^1/_4SE^1/_2$ $SW^1/_4SW^1/_4$, $N^1/_2SE^1/_4SW^1/_4$, $SE^1/_4SE^1/_4$ $SW^1/_4$, $N^1/_2SW^1/_4SE^1/_4SW^1/_4$, $SE^1/_4SW^1/_4$ $SE^1/_2SW^1/_4$, $SE^1/_4$;

SEC. 9: $NW^1/_4$, $E^1/_2$, $SW^1/_4$, $E^1/_2NW^1/_4SW^1/_4$, $N^1/_2NW^1/_4NW^1/_4SW^1/_4$, $SE^1/_2NW^1/_4NW^1/_4$ $SW^1/_4$, $NE^1/_4SW^1/_4NW^1/_4SW^1/_4$, $E^1/_2NE^1/_4$ $SW^1/_4SW^1/_4$, $SE^1/_4$, $W^1/_2NE^1/_4$, $W^1/_2SE^1/_4$ $NE^1/_4$, $SE^1/_4SE^1/_4NE^1/_4$, $W^1/_2NE^1/_4SE^1/_4$ $NE^1/_4$, $S^1/_2SW^1/_4NE^1/_4NE^1/_4$, $NW^1/_4SW^1/_4$ $NE^1/_4NE^1/_4$, $W^1/_2NW^1/_4NE^1/_4NE^1/_4$;

Sec. 10: $W^1/_2SW^1/_4SW^1/_4$, $W^1/_2SE^1/_4SW^1/_4$ $SW^1/_4$, $SW^1/_4NE^1/_4SW^1/_4SW^1/_4$, $S^1/_2SW^1/_4$ $NW^1/_4SW^1/_4$, $NW^1/_4SW^1/_4NW^1/_4SW^1/_4$, $W^1/_2$ $NW^1/_4NW^1/_4SW^1/_4$.

Warner T. May,
Manager.

[F.R. Doc. 62-3734; Filed, Apr. 17, 1962; 8:46 a.m.]

Appendix M

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Harrington Wimberly, Acting Chairman; Dale E. Dety, Commissioners; Claude L. Drapor and Nelson Lee Smith.

November 4, 1952

In the Matter of	)	Docket No. DA-59-Alaska,
Lands Withdrawn in	)	
Power Site Reserve No. 674 and	)	Bureau of Land
Power Site Classification	)	Management
Nos. 107 and 399	)	

DETERMINATION UNDER SECTION 24 OF THE FEDERAL POWER ACT

The Bureau of Land Management, United States Department of the Interior, has requested a determination under section 24 of the Federal Power Act with respect to the following described lands in the Territory of Alaska;

T. 14 N., R. 1 E., all unsurveyed lands located within 1/4 mile of Peters Creek;
all unsurveyed lands located within 1/2 mile of and/or at an altitude of 500 feet or less adjacent to Eagle River and its tributaries.

T. 15 N., R. 1 E., all unsurveyed lands located within 1/4 mile of Peters Creek.

T. 14 N., R. 1 W., sec. 17, S1/2,
sec. 18, S1/2

and all unsurveyed lands located within 1/4 mile of, and/or at an altitude of 500 feet or less adjacent to Eagle River and its tributaries.

T. 15 N., R. 1 W., sec. 4, W1/2SW1/4, SW1/4SW1/4;
sec. 5, SE1/4;
sec. 9, lots 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, that part of lot 5 lying within 1/4 mile of Peters Creek, and the W1/2NE1/4, NW1/4, NE1/4SW1/4, E1/2NE1/4SE1/4, SE1/4SE1/4;
sec. 10, SW1/4SE1/4, SW1/4;
sec. 16, NE1/4NE1/4,
and all unsurveyed lands lying within 1/4 mile of Peters Creek.

T. 14 N., R. 2 W., sec. 8, SE1/4SE1/4, SW1/4SW1/4;
sec. 9, SE1/4NE1/4, SE1/4, NE1/4SW1/4, S1/2SW1/4;
sec. 10, S1/2N1/2, S1/2;
sec. 11, S1/2NW1/4, W1/2W1/2SE1/4, SW1/4;
sec. 13, NW1/4NE1/4, S1/2NE1/4, NW1/4, S1/2;
sec. 14, N1/2N1/2, N1/4SE1/4NE1/4;
sec. 15, N1/2;
sec. 16, N1/2 N1/2SW1/4, SW1/4SW1/4;
sec. 17, NE1/4, N1/4NW1/4, E1/2SE1/4, NW1/4SW1/4;
and all unsurveyed lands located within 1/4 mile of and/or at an altitude of 500 feet or less adjacent to Eagle River and its tributaries.

Part of the subject lands are withdrawn in Power Site Reserve No. 674 created January 23, 1918 and part of the lands are withdrawn in Power Site Classification No. 107,

created June 12, 1925, and still other portions of the subject lands are embraced in the reserve of the Power Site Classification No. 399 approved March 29, 1950, supplementing Power Site Classification No. 107 above mentioned.

The subject lands lie near Eagle River or Peters Creek about midway between Anchorage and Palmer, Alaska. Peters Creek is a mountain stream which will at some future time be developed for power purposes by the diversion conduit method, Eagle River being a glacial-fed stream flowing through a trough-like depression wherein there is a suggested dam site in section 13, T. 14 N., R. 2 W. Owing to the existence of the hydroelectric development of Project No. 350 owned by the City of Anchorage, and the construction of a redevelopment project on Eklutna Lake and Creek by the Department of the Interior, with a 30,000 kilowatt installed capacity, the likelihood of any new development of Eagle River or Peters Creek appears to be remote.

Interested Federal officials have reported on the application.

The Commission Determines:

The value of all the lands above-described will not be injured or destroyed for purposes of power development by location or entry under the public land laws, subject to the provisions of Section 24 of the Federal Power Act, as amended, and subject to the stipulation, with respect to those lands reserved along Eagle River and its tributaries and located upstream from the North-South quarter section line of section 13, T. 14 N., R. 2 W., that when and if the lands or any portions thereof are required for purposes of power development, any improvements placed thereon which shall be found to interfere with such power development shall be removed or so relocated as may be found necessary to eliminate interference with such

power development without expense or damage to the United States, its permittees or licensees.

By the Commission.

/s/ Leon K. Fuqday
Loon K. Fuqday,
Secretary.

Date of Issuance: November 5, 1952

Appendix N

Secretary of Interior
Fred A. Seaton

Feb. 8, 1959

Dear Sir:

The undersigned are the homesteaders of Eagle River Valley in Alaska. We are told by the Land Office in Anchorage that we stand to lose all land below the 500' elevation, because it is held in reserve for the Federal Power Commission in Washington.

However, some of us, who would stand to lose our land in its entirety, wrote to the Power commission in Washington, and received an answer that this land was released by them in 1952, and that they have nothing to do with it anymore.

When Mr. Anderson of the Land Office was confronted with this letter, he informed us that they would have to take the land away from us regardless, until you, Mr. Seaton, would release it.

We would very much like to know what is going on, as every time we go to the Land Office, we get a different answer on the same question. For example: One of us is told

"Go ahead and file for land in the Eagle River Valley, it is open." An other one is told:

"Go ahead and file, but don't filebelow the 500' level, or you stand to lose your land, because it belongs to the Power Commission."

And others are advised to file on land that is below the 500' level.

Now, would you please look into this matter; it seems to the residents in this valley, that we are given the run-

around at the Land Office here in Anchorage, for some unknown reason.

Furthermore we are supposed to clear our land this spring, how can we afford to do this with the Land Office threatening to take away the only land worthwhile clearing.

Some of us stand to lose our very homes due to the confusion at the Land Office.

If this is up to you to clarify, we would appreciate an immediate answer.

Respectfully, the Homesteaders of Eagle River Valley, Alaska.

[Signature of Ralph A. Eklund, Therese U. Donnelly, and eight other homesteaders]

Appendix O

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

MAR 12 1959

Dear Mr. Eklund:

Secretary Seaton has asked us to write to you concerning the petition from the homesteaders of Eagle River Valley which you sent to us. We trust that you will inform the other petitioners of the contents of this letter.

We are familiar with the Eagle River Valley situation. You no doubt know that the Bureau of Land Management has had a cadastral engineering party in the Valley, for the purpose of determining the 500-foot contour line and the extent of conflicts of homesteads with the powersite reserve and with each other. You may also know that Senator Bartlett is interested in this matter and that we are keeping in touch with him.

We understand that some of you may have received incorrect information as to the powersite reserve. There has been some confusion over the fact that although the Federal Power Commission had indicated that it was no longer interested in the reserve, the reserve had not been opened to entry. Any misinformation is sincerely regretted but the fact remains that any settlement of the reserved lands cannot be recognized under existing law.

You may rest assured that we are not going to take any arbitrary action. After the cadastral engineering survey is completed, we are going to get a full report on the situation. After we study that report and the records, we will be in a better position to determine exactly what can be done in the circumstances.

In the meantime, we do not intend to revoke the powersite reserve. If we did that now, we would have to give the State of Alaska a preference right to select the lands and to give veterans of World War II and the Korean Conflict a preference right of application before we could make any other disposition of the lands. We do not want to complicate your position any more than it is. The Land Office Manager, of course, cannot allow any homestead applications for the reserved land until the reserve is revoked.

We are hopeful that the survey and our studies can be completed in the relatively near future.

Sincerely yours,

Assistant Secretary of the Interior
Roger Ernst

Mr. Ralph A. Eklund
Post Office Box 1475
Anchorage, Alaska

Appendix P - Statutes

Federal Power Act of 1920, §24; 16 U.S.C. §818

Any lands of the United States included in any proposed projection under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this subchapter, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon

the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided,* That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: *Provided further,* That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

Quiet Title Act of 1972, as amended; 28 U.S.C. §2409a(a)-(g), (n)

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended

(26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff if at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on

the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

43 U.S.C. §2

The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

43 U.S.C. §161

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands: but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

43 U.S.C. §164

No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such

entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this title, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: *Provided,* That upon filing in the local land office notice of the beginning of such absence the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided further,* That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death, and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land: *Provided further,* That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof, except that in the case of entries under section 218(f) of this title, double the area of cul-

tivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: *And provided further,* That the above provision as to cultivation shall not apply to entries under the Act of April 28, 1904, commonly known as the Kinkaid Act [43 U.S.C. 224], or entries under the Act of June 17, 1902, commonly known as the reclamation Act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required.

Alaska Native Claims Settlement Act, §2(a), (b); 43 U.S.C. §1601(a), (b)

Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska:

Alaska Native Claims Settlement Act, §3(e); 43 U.S.C. §1602(e)

For the purposes of this chapter, the term—

. . .

(e) "Public lands" means all Federal lands and interests therein located in Alaska except; (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat, 223), or identified for selection by the State prior to January 17, 1969;

Alaska Native Claims Settlement Act §11(a); 43 U.S.C. §1610(a)

(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

Alaska Native Claims Settlement Act, §14; 43 U.S.C. §1613

(a) Native villages listed in section 1610 and qualified for land benefits; patents for surface estates; issuance; acreage

Immediately after selection by a Village Corporation for a Native village listed in section 1610 of this title which

the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate in the number of acres shown in the following table:

If the village had on the 1970 census enumeration date a Native population between—	It shall be entitled to a patent to an area of public lands equal to—
25 and 99	69,120 acres.
100 and 199	92,160 acres
200 and 399	115,200 acres.
400 and 599	138,240 acres
600 or more	161,280 acres.

The lands patented shall be those selected by the Village Corporation pursuant to section 1611(a) of this title. In addition, the Secretary shall issue to the Village Corporation a patent to the surface estate in the lands selected pursuant to section 1611(b) of this title.

(b) Native villages listed in section 1615 and qualified for land benefits; patents for surface estates; issuance; acreage

Immediately after selection by any Village Corporation for a Native village listed in section 1615 of this title which the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate to 23,040 acres. The lands patented shall be the lands within the township or townships that enclose the Native village, and any additional lands selected by the Village Corporation from the surrounding townships withdrawn for the Native village by section 1615(a) of this title.

(c) Patent requirements; order of conveyance; vesting date; advisory and appellate functions of Regional Corporations on sales, leases, or other transactions prior to final commitment

Each patent issued pursuant to subsections (a) and (b) of this section shall be subject to the requirements of this subsection. Upon receipt of a patent or patents:

(1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 (except that occupancy of tracts located in the Pribilof Islands shall be determined as of the date of initial conveyance of such tracts to the appropriate Village Corporation) as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

(2) the Village Corporation shall then convey to the occupant, either without consideration or upon payment of an amount not in excess of fair market value, determined as of the date of initial occupancy and without regard to any improvements thereon, title to the surface estate in any tract occupied as of December 18, 1971 by a nonprofit organization;

(3) the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: *Provided,* That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres unless the Village Corporation and the Municipal Corporation or the State in trust can

agree in writing on an amount which is less than one thousand two hundred and eighty acres: *Provided further,* That any net revenues derived from the sale of surface resources harvested or extracted from lands reconveyed pursuant to this subsection shall be paid to the Village Corporation by the Municipal Corporation or the State in trust: *Provided, however,* That the word "sale", as used in the preceding sentence, shall not include the utilization of surface resources for governmental purposes by the Municipal Corporation or the State in trust, nor shall it include the issuance of free use permits or other authorization for such purposes;

(4) the Village Corporation shall convey to the Federal Government, State, or to the appropriate Municipal Corporation, title to the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure safe approaches to airport runways as such airport sites, runways, and other facilities existed as of December 18, 1971; and

(5) for a period of ten years after December 18, 1971, the Regional Corporation shall be afforded the opportunity to review and render advice to the Village Corporations on all land sales, leases or other transactions prior to any final commitment.

(d) Rule of approximation with respect to acreage limitations

The Secretary may apply the rule of approximation with respect to the acreage limitations contained in this section.

(e) Surface and/or subsurface estates to Regional Corporations

Immediately after selection by a Regional Corporation, the Secretary shall convey to the Regional Corporation

title to the surface and/or the subsurface estates, as is appropriate, in the lands selected.

(f) Patents to Village Corporations for surface estates and to Regional Corporations for subsurface estates; excepted lands; mineral rights, consent of Village Corporations

When the Secretary issues a patent to a Village Corporation for the surface estate in lands pursuant to subsections (a) and (b) of this section, he shall issue to the Regional Corporation for the region in which the lands are located a patent to the subsurface estate in such lands, except lands located in the National Wildlife Refuge System and lands withdrawn or reserved for national defense purposes, including Naval Petroleum Reserve Numbered 4, for which in lieu rights are provided for in section 1611(a)(1) of this title: *Provided,* That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation.

(g) Valid existing rights preserved; saving provisions in patents; patentee rights; administration; proportionate rights of patentee

All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases,

contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement.

(h) Authorization for land conveyances; surface and subsurface estates

The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title, and 7 follows:

(1) The Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places. Only title to the surface estate shall be conveyed for lands located in a Wildlife Refuge, when the cemetery or historical site is greater than 640 acres.

(2) The Secretary may withdraw and convey to a Native group that does not qualify as a Native village, if it incorporates under the laws of Alaska, title to the surface estate in not more than 23,040 acres surrounding the Native group's locality. The subsurface estate

in such land shall be conveyed to the appropriate Regional Corporation unless the lands are located in a Wildlife Refuge;

(3) The Secretary may withdraw and convey to the Natives residing in Sitka, Kenai, Juneau, and Kodiak, if they incorporate under the laws of Alaska, the surface estate of lands of a similar character in not more than 23,040 acres of land, which shall be located in reasonable proximity to the municipalities. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporation unless the lands are located in a Wildlife Refuge;

(4) The Secretary shall withdraw only such lands surrounding the villages and municipalities as are necessary to permit the conveyance authorized by paragraphs (2) and (3) to be planned and effected;

(5) The Secretary may convey to a Native, upon application within two years from December 18, 1971, the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence on August 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporations unless the lands are located on a Wildlife Refuge;

(6) The Secretary shall charge against the 2 million acres authorized to be conveyed by this section all allotments approved pursuant to section 1617 of this title during the four years following December 18, 1971. Any minerals reserved by the United States pursuant to the Act of March 8, 1922 (42 Stat. 415), as amended [43 U.S.C. 270-11 to 270-13], in a Native Allotment approved pursuant to section 1617 of this title during the period December 18, 1971, through December 18, 1975, shall be conveyed to the appropriate Regional Corporation, unless such lands are located in a Wildlife Ref-

ugee or in the Lake Clark areas as provided in section 12 of the Act of January 2, 1976 (Public Law 94-204), as amended.

(7) The Secretary may withdraw and convey lands out of the National Wildlife Refuge System and out of the National Forests, for the purposes set forth in paragraphs (1), (2), (3), and (5) of this subsection; and

(8)(A) Any portion of the 2 million acres not conveyed by this subsection shall be allocated and conveyed to the Regional Corporations on the basis of population.

(B) Such allocation as the Regional Corporation for southeastern Alaska shall receive under this paragraph shall be selected and conveyed from lands that were withdrawn by sections 1615(a) and 1615(d) of this title and not selected by the Village Corporations in southeastern Alaska; except lands on Admiralty Island in the Angoon withdrawal area and, without the consent of the Governor of the State of Alaska or his delegate, lands in the Saxman and Yakutat withdrawal areas are not available for selection or conveyance under this paragraph.

(9) Where the Regional Corporation is precluded from receiving the subsurface estate in lands selected and conveyed pursuant to paragraph (1), (2), (3), or (5), or the retained mineral estate, if any, pursuant to paragraph (6), it may select the subsurface estate in an equal acreage from other lands withdrawn for such selection by the Secretary, or as to Cook Inlet Region, Incorporated, from those areas designated for in lieu selection in paragraph I.B.(2) of the document identified in section 12(b) of Public Law 94-204. Selections made under this paragraph shall be contiguous and in reasonably compact tracts except as separated by unavailable lands, and shall be in whole sections, except where the remaining entitlement is less than six hundred and forty acres. The Secretary is authorized to withdraw, up to two times

the Corporation's entitlement, from vacant, unappropriated, and unreserved public lands, including lands solely withdrawn pursuant to section 1616(d)(1) of this title, and the Regional Corporation shall select such entitlement of subsurface estate from such withdrawn lands within ninety days of receipt of notification from the Secretary.

(10) Notwithstanding the provisions of subsection 1621(h) of this title the Secretary, upon determining that specific lands are available for withdrawal and possible conveyance under this subsection, may withdraw, such lands for selection by and conveyance to an appropriate applicant and such withdrawal shall remain until revoked by the Secretary.

(11) For purposes set forth in paragraphs (1), (2), (3), (5), and (6) of this subsection, the term Wildlife Refuges refers to Wildlife Refuges as the boundaries of those refuges exist on December 18, 1971.

Alaska Native Claims Settlement Act §17(b)(2); 43 U.S.C. §1616(b)(2)

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided*, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

Alaska Native Claims Settlement Act, §22(b), (c), Act of Dec. 2, 1980, 94 Stat. 2496, §1410; 43 U.S.C. §1621(b), (c), (j)

(b) Patents for homesteads, headquarters sites, trade and manufacturing sites, or small tract sites; use and occupancy protection

The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 682[a]), and who have fulfilled all requirements of the law prerequisite to obtaining a patent. Any person who has made a lawful entry prior to August 31, 1971, for any of the foregoing purposes shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met even though the lands involved have been reserved or withdrawn in accordance with Public Land Order 4582, as amended, or the withdrawal provisions of this chapter: *Provided*, That occupancy must have been maintained in accordance with the appropriate public land law: *Provided further*, That any person who entered on public lands in violation of Public Land Order 4582, as amended, shall gain no rights.

(c) Mining claims; possessory rights, protection

On any lands conveyed to Village and Regional Corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate State or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all requirements of the general mining laws are complied with, proceed to patent.

(j) Interim conveyances and underselections

(1) Where lands to be conveyed to a Native, Native Corporation, or Native group pursuant to this chapter as amended and supplemented have not been surveyed, the same may be conveyed by the issuance of an "interim conveyance" to the party entitled to the lands. Subject to valid existing rights and such conditions and reservations authorized by law as are imposed, the force and effect of such an interim conveyance shall be to convey to and vest in the recipient exactly the same right, title, and interest in and to the lands as the recipient would have received had he been issued a patent by the United States. Upon survey of lands covered by an interim conveyance a patent thereto shall be issued to the recipient. The boundaries of lands as defined and conveyed by the interim conveyance shall not be altered but may then be redescribed, if need be, in reference to the plat of survey. The Secretary shall make appropriate adjustments to insure that the recipient receives his full entitlement. Where the term "patent," or a derivative thereof, is used in this chapter unless the context precludes such construction, it shall be deemed to include "interim conveyance," and the conveyances of land to Natives and Native Corporations provided for this chapter shall be as fully effectuated by the issuance of interim conveyances as by the issuance of patents.

(2) Where lands selected and conveyed, or to be conveyed to a Village Corporation are insufficient to fulfill the Corporation's entitlement under section 1611(b), 1613(a), 1615(b), or 1615(d) of this title, the Secretary is authorized to withdraw twice the amount of unfulfilled entitlement and provide the Village Corporation ninety days from receipt of notice from the Secretary to select from the lands withdrawn the land it desires to fulfill its entitlement. In

Alaska Native Claims Settlement Act, §26; Pub. Law 92-203, 85 Stat. 715 (Dec. 18, 1971)

Sec. 26. To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.

43 U.S.C. § 1632.

(a) Except for administrative determinations of navigability for purposes of determining ownership of submerged lands under the Submerged Lands Act [43 U.S.C.A. §§ 1301 et seq., 1311 et seq.], a decision of the Secretary under this chapter or the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] shall not be subject to judicial review unless such action is intitiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later: *Provided*, That the party seeking such review shall first exhaust any administrative appeal rights.

(b) Decisions made by a Village Corporation to reconvey land under section 14(c) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1613(c)] shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within one year after the date of the filing of the map of boundaries as provided for in regulations promulgated by the Secretary.

AS (Alaska Statutes) 9.10.230:
Sec. 09.10.230. Certain actions relating to real property.

No person may bring an action for the determination of a right or claim to or interest in real property unless commenced within the limitations provided for actions for the recovery of the possession of real property. But no person may bring an action to set aside, cancel, annul, or otherwise affect a patent to land issued by this state or the United States, or to compel a person claiming or holding under a patent to convey the land described in the

patent or a portion of the land to the plaintiff in the action, or to hold the land in trust for or to the use and benefit of the plaintiff, or on account of any matter, thing, or transaction which was had, done, suffered, or transpired before the date of the patent unless commenced within 10 years from the date of the patent. In an action upon a new promise, fraud, or mistake, the running of the time within which an action maybe commenced starts from the making of the new promise or the discovery of the fraud or mistake. This section does not bar an equitable owner in possession of real property from defending possession by means of the equitable title. The right of an equitable owner to defend possession in an action or by complaint for injunction is not barred by lapse of time while an action for the possession of the real property is not barred by the provisions of this chapter.

Appendix Q - Regulations

43 CFR §2650.3-1(a) (1977)

(a) Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements.

43 CFR 2650.4-1 (1977)

Any conveyance issued for surface and subsurface rights under this act will be subject to any lease, contract, permit, right-of-way, or easement and the rights of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted him.

§ 2650.5-4 Village surveys. (1987)

(a) Only the exterior boundaries of contiguous entitlements for each village corporation will be surveyed. Where land within the outer perimeter of a selection is not selected, the boundaries along the area excluded shall be deemed exterior boundaries. The survey will be made after the total acreage entitlement of the village has been selected.

(b) Surveys will be made within the village corporation selections to delineate those tracts required by law to be conveyed by the village corporations pursuant to section 14(c) of the Act.

(c) (1) The boundaries of the tracts described in paragraph (b) of this section shall be posted on the ground and

shown on a map which has been approved in writing by the affected village corporation and submitted to the Bureau of Management. Conflicts arising among potential transferees identified in section 14(c) of the Act, or between the village corporation and such transferees, will be resolved prior to submission of the map. Occupied lots to be surveyed will be those which were occupied as of December 18, 1971.

(2) Lands shown by the records of the Bureau of Land Management as not having been conveyed to the village corporation will be excluded by adjustments on the map by the Bureau of Land Management. No surveys shall begin prior to final written approval of the map by the village corporation and the Bureau of Land Management. After such written approval, the map will constitute a plan of survey. Surveys will then be made in accordance with the plan of survey. No further changes will be made to accommodate additional section 14(c) transferees, and no additional survey work desired by the village corporation or municipality within the area covered by the plan of survey or immediately adjacent thereto will be performed by the Secretary.

43 CFR §2650.7 (1977)

§2650.7 Publication.

In order to determine whether there are any adverse claimants to the land, the applicant should publish notice of his application. If the applicant decides to avail himself of the privilege of publishing a notice to all adverse claimants and requests it, the authorized officer will prepare a notice for publication. The publication will be in accordance with the following procedure:

(a) The applicant will have the notice published allowing all persons claiming the land adversely to file in the appropriate land office their objections to the issuance of any

conveyance. The notice shall be published once a week for 4 consecutive weeks in a newspaper of general circulation.

(b) The applicant shall file a statement of the publisher, accompanied by a copy of the published notice, showing that publication has been had for 4 consecutive weeks. The applicant must pay the cost of publication.

(c) Any adverse claimant must serve on the applicant a copy of his objections and furnish evidence of service thereof to the appropriate land office.

(d) For all land selections made under the act, in order to give actual notice of the decision of the Bureau of Land Management proposing to convey lands, the decision shall be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision, the appropriate regional corporation, and any Federal agency of record. In order to give constructive notice of the decision to any unknown parties, or to known parties who cannot be located after reasonable efforts have been expended to locate, who claim a property interest or other valid existing right in land affected by the decision, notice of the decision shall be published once in the Federal Register and, once a week, for four (4) consecutive weeks, in one or more newspapers of general circulation in the State of Alaska nearest the locality where the land affected by the decision is situated, if possible. Any decision or notice actually served on parties or constructively served on parties in accord with this subsection shall state that any party claiming a property interest in land affected by the decision may appeal the decision to the Alaska Native Claims Appeals Board. The decision or notice of decision shall also state that: (1) any party receiving actual notice of the decision shall have 30 days from the receipt of actual notice to file an appeal; and, (2) that any unknown parties, any parties unable to be located after reasonable efforts have been expended to locate, and any parties who failed or refused to sign a

receipt for actual notice, shall have 30 days from the date of publication in the Federal Register to file an appeal. Furthermore, the decision or notice of decision shall inform readers where further information on the manner of, and requirements for, filing appeal may be obtained, and shall also state that any party known or unknown who may claim a property interest which is adversely affected by the decision shall be deemed to have waived their rights which were adversely affected unless an appeal is filed with the Alaska Native Claims Appeal Board in accordance with the requirements stated in the decisions or notices provided for in this subsection and the regulations governing such appeals set out in 43 CFR Part 4, Subpart J.

43 CFR §2651.5 (1977)

In addition to the conveyance reservations in §2650.4 of this chapter, conveyances issued to village corporations shall provide for the transfer of the surface estates specified in section 14(c) of the act, and shall be subject to valid existing rights under section 14(g) of the act.

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-533

In The
Supreme Court of the United States
October Term, 1988

—o—

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR and DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

RESPONDENT EKLUTNA, INC.'S BRIEF IN OPPOSITION

—o—

DAVID P. WOLF
JAMES S. CRANE
Counsel for Respondent, Eklutna, Inc.
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

1. Whether petitioner's suit against the United States claiming title to land under the homestead laws is barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g), because petitioner knew or should have known of the United States' claim to the land when his homestead claim was denied by the Secretary of Interior in the late 1950's and when the Bureau of Land Management published its Notice of Filing Plat of Survey describing withdrawn areas in 1961?

2. Whether the United States is an indispensable party to petitioner's suit against the respondent Alaska Native Village Corporation that holds the disputed land under patent to the surface estate issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, because, under ANCSA, a judgment in petitioner's favor would enable the Village Corporation to obtain additional land from the United States?

3. Whether ANCSA § 14(c)(1), 43 U.S.C. 1613(c)(1), should be construed against a trespasser on Federal land to deny him amnesty and the right to take land from an Alaska Native Village Corporation, the intended beneficiary of ANCSA and holder of the patent to the land?

4. Whether the United States is an indispensable party to a suit by a failed homesteader under ANCSA § 14(c)(1) against an Alaska Native Village Corporation?

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STATEMENT OF THE CASE

This case concerns the ownership of 92.5 acres of land in the Eagle River Valley near Anchorage, Alaska. Long before any white settlement, the Eagle River Valley was encumbered by aboriginal title and by traditional subsistence use and occupation of the valley by Alaska Natives.[1] These traditional claims of aboriginal title by the Natives were formally presented for adjudication before the Indian Claims Commission in 1953.[2] Pet. App. E[3] at 84a. These claims were extinguished by the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1601 *et seq.* 43 U.S.C. 1603(b). Pursuant to ANCSA, Eklutna, Inc.[4] ("Eklutna") was formed as the Village Corporation which includes as shareholders the Natives of the disputed area. 43 U.S.C. 1607(a), 1610(b). Eklutna selected and received patent to the surface estate to lands, including those currently in dispute, as settlement of their aboriginal claims. 43 U.S.C. 1611(a)(1), 1613(a).

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[1]The term "Natives" in Alaska includes Indians, Aleuts, and Eskimos.

[2]Even earlier, all the lands in the Eagle River Valley which are relevant to this case had been part of the Eklutna Reserve established under the Indian Reorganization Act. Pet. App. E at 84a.

[3]"Pet. App." refers to petitioner's Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. "Pet. App. E" refers to the Findings of Fact, *United States v. Donnelly*, A75-27 Civil, United States District Court for the District of Alaska, February 5, 1981, pp. 58a-86a of petitioner's Appendix.

[4]Pursuant to Supreme Court Rule 28.1, Eklutna, Inc. has no parent company or subsidiary, except wholly owned subsidiaries.

In 1925, Power Site Classification ("PSC") 107 withdrew the disputed land from appropriation under the public land laws for power site purposes under § 24 of the Federal Power Act, 16 U.S.C. 818. In 1950, PSC 399 also withdrew the land. Pet. App. E at 60a. Although in 1952 the Federal Power Commission ("FPC") determined that the value of the disputed land would not be injured or destroyed for the purposes of power development by location or entry, Pet. App. M at 107a, the Secretary of Interior never acted pursuant to § 24 of the Federal Power Act to revoke the withdrawal, and the land therefore remained closed to entry. Pet. App. C at 35a.

In 1957, petitioner Joseph Donnelly ("petitioner" or "Donnelly") filed a Notice of Location of Settlement of Occupancy Claim in Alaska, embracing, *inter alia*, the land now in dispute. Pet. App. E at 59a; Gov. Summary Judgment Ex.[5] 1A (4/22/57 Notice). On November 14, 1957, the Bureau of Land Management ("BLM") issued its first decision denying the Donnelly Claim. Pet. App. E at 65a; Tr. Ex. EK[6]-D. The denial of Donnelly's entry was based upon the power site conflict, and it informed Donnelly that even if the land were restored to entry, the filing of the location notice would confer no preferential rights upon him. Tr. Ex. EK-D. Although the adverse decision advised Donnelly of his right to appeal, *id.*, he failed to. Instead, he filed a second Notice of Location on the same land on May 2, 1958. Pet. App. E at 65a; Tr. Ex. EK-D.

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[5]"Gov. Summary Judgment Ex." refers to the federal government's exhibits on summary judgment.

[6]"Tr. Ex. EK" refers to Eklutna's Trial Exhibits

Donnelly then asked the FPC to restore the lands to entry under the homestead laws. Pet. App. E at 66a. In a November 1958 response, the FPC informed him of the 1952 no injury determination but stated that actual restoration was a function of the BLM. *Id.* Donnelly then unsuccessfully sought the help of Alaska's Senator Bartlett to obtain his 160 acres. Pet. App. E at 66a-67a. The BLM informed the senator that Donnelly was in trespass on a federal power reserve. Moreover, the FPC told the senator that revocation of the power site reserve would not necessarily result in Donnelly securing rights to the land because the State of Alaska and veterans would have preference under the homestead laws. Pet. App. E at 66a-69a.

On February 8, 1959, petitioner and several other homestead claimants in Eagle River sent a letter to the Secretary of Interior, asking for "clarification" of the status of their entries. Pet. App. E at 69a; ER-D[7] 212-13. The letter was not identified as an appeal of adverse agency decisions. The Assistant Secretary responded on March 12, 1959, expressly stating that "any settlement of the reserved lands cannot be recognized under existing law" and that there was no intent to revoke the powersite reserve. ER-D 214-15; Pet. App. E at 69a-70a.

Shortly before the Assistant Secretary's March 12 letter, Donnelly submitted his final proof on March 2, 1959. Pet. App. E at 70a; Gov. Summary Judgment Ex. 1B. He was notified on March 5, 1959 that his claim was denied and that he was in trespass. Pet. App. E at 70a-71a, Tr. Ex. EK-O:

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[7]"ER-D" refers to Donnelly's Excerpt of Record in the appeal to the Ninth Circuit.

> The records show that the lands in question are not subject to settlement or occupancy because they have not been restored from [PSC] 399. . . . While it is true that the [FPC] made a favorable determination November 4, 1952, . . . none of the unsurveyed lands have been restored to entry by the [BLM], and in all probability no action will be taken to restore them until they have been surveyed. . . .
>
> You previously filed a homestead location notice . . . for the same lands and were advised that they were not subject to settlement or occupancy.
>
> In view of the foregoing, any use or occupancy of these lands will constitute a trespass against the United States.

In March 1961, a Notice of Filing Plat of Survey was officially promulgated and published in the Federal Register delineating the boundaries of PSCs 107 and 399. 26 Fed. Reg. 2486 (1961). All but forty acres of Donnelly's claimed 160 acres remained within PSCs 107 and 399 and therefore remained closed to entry. Pet. App. E at 72a. Accordingly, petitioner was served with a final decision rejecting his entry to the extent it conflicted with the surveyed withdrawals and reinstating his claim as to available lands. Tr. Ex. EK-W (5/12/61 Decision). Indicating that it wished to reach an equitable settlement, however, the BLM vacated its decision as to lands *outside* the withdrawal area on May 15, 1961, "pending further investigations which may result in a more equitable conformance of the withdrawals or delineation of the actual withdrawal line as originally described". The decision warned that it "is not to be construed as granting any rights or concessions to the withdrawn lands. . . ." Pet. App. E at 72a-73a. In 1962, BLM refined its survey and determined that 67.5 acres of Donnelly's claim was out-

side of the reserves and that 92.5 acres were within the withdrawn area. Pet. App. E at 74a. Thus, at no time did the United States claim less than 92.5 acres of Donnelly's entry.

On February 21, 1963, the report of field examination of Donnelly's claim was filed. In addition to noting partial conflict with the power withdrawals, the report noted that Donnelly had not complied with the improvement or cultivation requirements. Final certificate and patent were not recommended. Pet. App. E at 75a; Tr. Ex. EK-BC. The report also concluded that little, if any, of the area within the withdrawals was truly suitable for agriculture. *Id.*

The BLM was willing to consider granting patent for the portion of Donnelly's entry located outside the withdrawal area but was faced with the problem that Donnelly's original dwelling and cultivation were located within the withdrawn portion. Donnelly notified the BLM in June, 1963 that he had retained legal counsel, who met with the BLM to discuss a "workable solution." Pet. App. E at 76a; Tr. Ex. EK-BF. In September 1963, the lawyer wrote to BLM that "the possibilities of compromise appear likely," and requested that the BLM "not issue decisions with regard" to Donnelly's entry. Tr. Ex. EK-BK.

The BLM agreed to a solution whereby Donnelly's improvements on the 92.5 acres in the withdrawn area would be considered "constructive" residence and cultivation, with additional time allowed to comply upon available land, even though the five year life of Donnelly's claim had expired. Pet. App. E at 79a-80a; Tr. Ex. EK-BR (6/11/64 letter). Donnelly chose to settle his claim for the 67.5

available acres and represented to BLM that he would not pursue the entire 160 acres of his original claim. Tr. Ex. BQ (10/18/63 memo). In accordance with the BLM's requirements, he agreed to place his house and cultivation on the 67.5 acre portion outside the reserve, filed a new homestead application, and submitted affidavits asserting compliance. *Id.*; Tr. Ex. SSS, TTT, and UUU.

On June 25, 1965, patent was issued to Donnelly for 67.5 acres outside the withdrawn area. Tr. Ex. EK-BT; Pet. App. E at 80a-81a. Although represented by counsel, Donnelly failed to appeal the BLM's decision not to grant him the withdrawn 92.5 acres. Instead, he filed a Petition for Revocation of Power Sites affecting the 92.5 acres. Tr. Ex. EK-CF. His Petition was denied on May 13, 1968. Pet. App. E at 81a; Tr. Ex. EK-CF. Donnelly appealed this decision but the decision was affirmed. Pet. App. E at 81a-83a; Tr. Ex. EK-CH. Donnelly took no further administrative action. Pet. App. 83a.

On December 22, 1970, Donnelly was served with a Notice of Trespass, alleging that he had unlawfully entered upon withdrawn Federal land. *Id.*; Tr. Ex. EK-CJ. Donnelly not only failed to move, he actually proceeded with construction on the disputed land. Pet. App. C at 39a.

Upon the adoption of ANCSA on December 18, 1971, the disputed lands were again withdrawn to allow for selection and conveyance to Native Corporations. 43 U.S.C. 1610(a). The disputed lands were among those listed on Eklutna's selection application filed on July 17, 1974 pursuant to 43 U.S.C. 1611(a)(1). In 1979, the United States issued patents to Eklutna for the surface estate of these lands.

On February 10, 1975, the United States filed a trespass action against Donnelly in the United States District Court for the District of Alaska. CR-D[8] 1 (Complaint). On May 23, 1975, at least fourteen years after being informed of the claim of the United States, ER-D 128, Donnelly filed a counterclaim in district court. CR-5. After the United States issued its patent to Eklutna in 1979, the district court dismissed the government's trespass action, and Eklutna came into the action in order to protect its ownership interest in the disputed lands. Pet. App. D at 41a.

Donnelly subsequently filed a series of claims against Eklutna, attacking the validity of the federal patent to the disputed land and claiming that his homestead rights to title were preserved as against Eklutna through ANCSA § 14(g) (43 U.S.C. 1613(g)) as a "valid existing right,"[9] and through 22(b) (43 U.S.C. 1621(b)) as a homestead

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[8]"CR-D" refers to the Donnelly Court Record.

[9]ANCSA § 14(g) provides in pertinent part:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

claim,[10] as well as through the application of several common-law theories. In addition, Donnelly claimed title to the disputed land as a primary place of residence under ANCSA § 14(c)(1) (43 U.S.C. 1613(c)(1)),[11] a claim which did not attack the validity of the federal patent but which demanded that Eklutna reconvey the disputed land. Pet. App. C at 41a. In 1982, the district court dismissed Donnelly's counter-claims against the United States and his claims against Eklutna based on the validity of the United States patent for lack of jurisdiction.[12] Pet. App. B.

In 1979, another claimant to a homestead in the Eagle River Valley, James Lee, filed suit against the United States and Eklutna, alleging essentially the same claims as petitioner and represented by the same counsel. Pet. App. C. at 42a. The district court dismissed all of Lee's

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[10]ANCSA § 22(b) provides in pertinent part:

> The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites . . . , and who have fulfilled all requirements of the law prerequisite to obtaining a patent.

[11]ANCSA § 14(c) provides in pertinent part that, upon receipt of a patent or patents,

> (1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 . . . as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry; . . .

[12]Donnelly's § 14(c)(1) claim was not addressed, nor was his third cause of action against Eklutna, which alleged violations of equal protection and due process. Pet. App. D at 51a, n. 1.

claims, except for his § 14(c)(1) claim, for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985). Lee's claims against the federal government and against Eklutna under §§14(g) and 22(b) and common law theories were consolidated with two similar cases for appeal to the Ninth Circuit, which affirmed the judgment of the district court. *Lee v. United States,* 809 F.2d 1406 (9th Cir. 1987). Recently, this Court denied certiorari, *sub nom Lee v. Eklutna, Inc.,* — U.S. —, 108 S.Ct. 772 (1988).

During this period, Lee's § 14(c)(1) claim was consolidated with Donnelly's case by the district court for the purpose of oral argument on the § 14(c)(1) issue. CR-D 284. On November 14, 1986, the district court filed an order dismissing Donnelly's and Lee's § 14(c)(1) claims, granting summary judgment to Eklutna, on the grounds, *inter alia,* that the disputed lands were at all times validly withdrawn, that Donnelly and Lee therefore never made valid entry, and that an illegal occupant cannot gain rights under § 14(c)(1). Pet. App. C.

On December 5, 1986, the district court amended its 1982 decision dismissing Donnelly's homestead claim against the United States and against Eklutna based on the validity of the patent, adopting its analysis in *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985), on those issues. Pet. App. D. Judgment was issued, which included Rule 54(b) certifications on those issues.[13] ER-D

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[13]The district court also dismissed Donnelly's constitutional claims. Pet. App. D at 54a-56a. Eklutna's ejectment action against Donnelly is still pending.

46-49. The Ninth Circuit affirmed. *Donnelly v. United States*, 841 F.2d 968 (9th Cir. 1988).[14] Donnelly then filed this petition. Lee has also filed a petition for certiorari, No. 88-549, as to his § 14(c)(1) claim.

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REASONS WHY THE PETITION SHOULD BE DENIED

Donnelly's non-§ 14(c)(1) claims were the same as those litigated and lost by the claimant in *Lee v. United States, supra.* This Court recently denied certiorari, 108 S.Ct. 772 (1988), and no reason exists why certiorari should now be granted on the same claims.

As to Donnelly's § 14(c)(1) claim, the court of appeals was correct in holding that the language and intent of that law do not require that trespassers be awarded land at the expense of Native Corporations, the intended beneficiaries of ANCSA, and that the United States is an indispensable party to a § 14(c)(1) claim based on a homesteading claim. This holding does not conflict with the recent decision of the Alaska Supreme Court in *Hakala v. Atxam Corp.*, 753 P.2d 1144 (Alaska 1988).

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[14]The reported decision, which was issued on March 10, 1988, is not the Amended Opinion of the Court of Appeals, issued on June 27, 1988. The Amended Opinion is set forth at Pet. App. A. The Amended Opinion differs from the reported decision in that having a reference to a case decided by the Alaska Supreme Court issued just after the reported decision (and apparently without the knowledge of the reported decision), *Hakala v. Atxam Corp.*, 753 P.2d 1144 (Alaska 1988). See Pet. App. A at 16a, n.9. See, this Opposition, *infra*, at pp. 22 to 23.

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals. The decision does not present a question of general importance that should be reviewed by this Court.

I. PETITIONER'S CLAIMS AGAINST THE UNITED STATES WERE PROPERLY DISMISSED.

Donnelly's homestead claims against the United States are the same as Lee's and involve almost identical facts. The Ninth Circuit, having held in *Lee,* 809 F.2d 1406 (9th Cir. 1987), that virtually identical claims were barred by the statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g), did the same in this case. *Donnelly v. United States,* 841 F.2d 968 (9th Cir. 1988). This court denied certiorari in *Lee* earlier this year, — U.S. —, 108 S.Ct. 772 (1988), and should do the same in this case.

Donnelly argues that his counterclaims against the United States, filed on May 23, 1975, were within the twelve year statute of limitations under 28 U.S.C. 2409a(g). Petition at 23-24. However, the district court found that his claim to the disputed lands accrued at least by 1958, when the BLM rejected his homestead entry, or by 1961 at the latest, when the BLM issued its survey covering the contested land and published notice of the survey in the Federal Register. Pet. App. D at 52a. The court of appeals agreed with the district court, holding that Donnelly had sufficient notice of the government's adverse claim by the time of the publication in the Federal Register to start the statute of limitations. 841 F.2d at 974. The court of appeals further found that Donnelly

by 1961 was not engaged in pursuit of administrative remedies that would toll the statute of limitations and that he "sat on his rights" and brought no quiet title claim from October 1972, when the Quiet Title Act was enacted, until May 1975. The statute of limitations expired during this period. 841 F.2d at 974 and n.8.

The twelve-year statute of limitations began to run when Donnelly "knew or should have known of the claim of the United States" to the disputed lands. 28 U.S.C. 2409a(g); *Lee v. United States*, 809 F.2d 1406, 1410 (9th Cir. 1987). Throughout the entire period that Donnelly dealt with the government, he was constantly being advised that the lands were withdrawn and that he was in trespass. *Supra* at pp. 12-17. As the *Lee* court of appeals court stated, 809 F.2d at 1410:

> A claim accrues as soon as a potential claimant either is aware or should be aware of the existence of and source of his injury, not when he knows or should know that the injury constitutes a legal wrong. A different rule would require insufficient diligence on the part of potential claimants. *See United States v. Kubrick*, 444 U.S. 111, 123-24 (1979).

The factual background that leads to Donnelly's request for "a different rule" aptly illustrates dangers of "insufficient diligence" on the part of claimants and the potential prejudice to the United States and to innocent third-parties, such as Eklutna.

In addition, the issue Donnelly raises can only be resolved through factual determinations that were previously decided adversely to Donnelly by two lower courts. In this case, such questions of fact do not constitute an appropriate subject for a grant of certiorari.

II. PETITIONER'S §§ 14(g) AND 22(b) CLAIMS AGAINST EKLUTNA WERE PROPERLY DISMISSED ON THE BASIS OF THE LEE PRECEDENT.

As Lee before him, Donnelly tries to assert his barred federal homestead claims against Eklutna by contending that they constitute a "valid existing right" under § 14(g) or were renewed by § 22(b) and can therefore be litigated against Eklutna. In essence, Donnelly is seeking a way into the courthouse through the backdoor. He is incongruously arguing that ANCSA, which was enacted to settle the aboriginal claims of Alaska Natives, should be construed to settle beneficially the stale claims of failed homesteaders, effectively giving those failed homesteaders rights against the Natives that they would not have had against the government.

However, the claim that a failed homesteader can litigate homestead claims under the guise of §§ 14(g) or 22(b) was rejected when advanced by Lee, who was similarly-situated and even represented by the same lawyer. *Lee v. United States*, 629 F.Supp. 721, 725 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied* — U.S. —, 108 S.Ct. 772 (1988). In *Lee*, the Ninth Circuit did not reach the merits of the claimant's arguments on §§ 14(g) and 22(b).[15] Instead, it held that the United States was an indispensible party to the action whose

[15]The *Lee* district court held that Lee failed to state a claim under § 14(g) because that statute protected rights that did not lead to title (e.g., leases, rights-of-way, easements, etc.). 629 F.Supp. at 729-730. The district court further held that a § 22(b) claim was a homestead claim that had to be made against the government, not a Native Corporation which was not under the duty to convey lands to homesteaders. 629 F.Supp. at 732.

absence required dismissal of the claims against the Native Corporation. 809 F.2d at 1411.

In this case, the court of appeals correctly relied upon *Lee* in dismissing petitioner's claims against Eklutna under ANCSA §§ 14(g) and 22(b) on the grounds that the United States is an indispensable party to a claim based on a homestead contesting the validity of a federal patent to a Native Corporation. The question whether a suit should be dismissed because of the absence of an indispensable party is governed by Fed. R. Civ. P. 19. The United States is a party that should be joined under Fed. R. Civ. P. 19(a) because if Donnelly prevails on his § 22(b) claim and Eklutna is required to convey the disputed land to Donnelly, the United States will have to make up the acreage to Eklutna. 43 U.S.C. 1621(j)(2). Similarly, if Donnelly prevails on his § 14(g) claim, which is nothing more than a § 22(b) homestead claim under another guise, and Eklutna is required to convey the disputed land to Donnelly, then Eklutna will claim additional land from the United States under 43 U.S.C. 1621(j)(2).[16] Thus, whether

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[16]Under § 22(b), homestead claims are to be decided by the Secretary *before* land is patented to a Village Corporation. Thus, a Village Corporation receives its full land entitlement notwithstanding any homesteads in the area. On the other hand, a Village Corporation takes its patent *subject to* the non-title § 14(g) rights, which arguably implies that a Village Corporation whose lands are subject to such rights actually receives less than a Village Corporation whose lands are free from such rights. However, if Eklutna is required to convey the disputed homestead land to Donnelly under § 14(g) because his was a homestead claim that the government did not decide prior to patent to Eklutna, then Eklutna will claim additional land from the United States on the same basis as it would if Donnelly prevails under § 22(b).

the United States will be deprived of additional land depends on whether Donnelly prevails in his suit against Eklutna. *See Nichols v. Rysavy*, 809 F.2d 1317 at 1333 (8th Cir.), *cert. denied* 108 S.Ct. 147 (1987):

> [T]he result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy. If the United States issued the patents legally, then the appellants' action is groundless. "In short, the government's liability cannot be tried 'behind its back.'" *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945)

Federal Rule of Civil Procedure 19(b) requires that, in the event an interested person under Rule 19(a) cannot be made a party, the court must determine whether "equity and good conscience" allows the action to proceed. In this case, an analysis of the four-part test described in Rule 19(b) shows that the court of appeals correctly dismissed Donnelly's claims because of the absence of the United States. The first part of the test is whether a judgment will prejudice the absent party. Here, the prejudice in the nature of the United States' obligation to convey additional lands to Eklutna is clear. The second part of the test is whether relief may be shaped to lessen the harm to the absent party. Again, the United States' obligation to convey additional land is absolute and cannot be modified.

The third and fourth parts of the test are whether a judgment rendered in the absence of the United States would be adequate and whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder. These factors may indicate to some extent that

Donnelly's suit against Eklutna should proceed. But the analysis of the fourth factor shows that equitable factors weigh against allowing such a suit to proceed. In failing to timely file an action under the Quiet Title Action ("QTA"), 28 U.S.C. 2409a, Donnelly simply "sat on his hands" to the prejudice of Eklutna. By 1961 at the very latest, Donnelly knew of the government's position that the disputed land was not available for homestead. If he had sued in a timely manner and prevailed, the United States could properly have been named as defendant, and the disputed land would have been excluded from selection and conveyance to Eklutna. Moreover, Eklutna would have been spared the obligation to defend a claim that is essentially against the United States. In light of Donnelly's failure to diligently enforce his rights, the court of appeals correctly concluded in the opinion below, as it did in *Lee,* that "equity and good conscience" cannot permit Donnelly to bring his claims contesting the validity of the patent to Eklutna in the absence of the United States.

Donnelly misconstrues § 22(b) when he argues that it provides "cumulative protection of prior homestead rights . . ." as a "non-QTA remedy since the United States claims no interest in the lands patented to Native Corporations." Petition at 12. The provision does in fact protect valid homestead claims, but no term in it purports to revive "prior homestead rights" that were barred by another statute (*e.g.*, the QTA).

In essence, Donnelly's argument is that Congress intended § 22(b) to give new life to every homestead and similar claim that ever was. If he is correct, then all

applications for homestead, trade and manufacturing sites or any other purposes, which were ever denied on all 40 million acres to be conveyed to Native Corporations under ANCSA, can be reopened and given a new two-year statute of limitations dating from the time of the decision to convey to a Native Corporation. However, Congress intended ANCSA to be a settlement of aboriginal claims, not to resurrect stale claims and extend or renew the period in which to contest old decisions.

To sum, the court of appeals correctly applied the *Lee* precedent to the facts in this case and dismissed Donnelly's §§ 14(g) and 22(b) claims against Eklutna attacking the validity of the patent from the United States. This Court denied certiorari in the *Lee* case earlier this year. The *Lee* case involved virtually identical facts and even the same lawyer for claimant. There appears to be no reason why certiorari should be granted in this case on the §§ 14(g) and 22(b) issues.

III. CONSTRUCTIVE TRUST IS NOT AN AVAILABLE REMEDY IN THIS CASE.

The court of appeals correctly dismissed Donnelly's common law claim for imposition on Eklutna of a constructive trust in regard to the disputed land. 841 F.2d at 975. The court of appeals in the first *Lee* appeals decision disposed of the constructive trust theory on the basis that the United States was an indispensable party. 809 F.2d at 1410-11. In this case the court of appeals in addition adopted the holding of the district court in *Lee*, 629 F. Supp. 721, 728-29 (D.Alaska 1985), that common law rights were pre-empted by the comprehensive scheme of ANCSA. The district court held that, in ANCSA, Congress "spoke

directly'' to claims such as Donnelly's, thereby pre-empting common law causes of action and remedies. *Id.* Eklutna cannot add to well-reasoned decision of the district court and will only summarize it here.

ANCSA's language, structure, and legislative history indicate that Congress intended it to provide a comprehensive and final resolution of all issues relating to Native land claims in Alaska. Congress viewed ANCSA as constituting a complete and detailed *''settlement package,''* in which Alaska Natives agreed to the extinguishment of all their claims based upon aboriginal title in exchange for fee title to more than 40 million acres and a cash settlement of about one billion dollars. H.Conf.Rep. No. 746, 92nd Cong. 1st Sess. 1, 34 (1971), U.S.Code Cong. & Admin. News 1971, p. 2192 (emphasis original). Allowing private parties to claim ownership to ANCSA-conveyances under a host of common-law theories would enable them to undermine the ANCSA settlement and to prevent Native Corporations from fully enjoying the fruits of the settlement for many years. 629 F.Supp. at 728.

Moreover, Congress ''spoke directly'' in ANCSA concerning individuals' rights to assert claims to ANCSA-conveyance lands based on prior use and occupancy. At least four separate, detailed ANCSA provisions address and define these rights. *See*, §§ 14(c)(1) (primary place of residence or occupancy); 14(g) (leases, contracts, rights-of-way, and easements); 22(b) (homesteads, headquarter sites, trade and manufacturing sites, and small tract sites); 22(c) (mining claims and locations). Congress believed that ''[a]ll valid existing rights to [ANCSA-conveyance lands], including inchoate rights of entrymen and mineral

locators, are protected'' under ANCSA. H.Conf.Rep. No. 746, at 37, U.S.Code Cong. & Admin.News 1971 at 2229. 629 F.Supp. at 728-729.

Since Congress ''spoke directly'' in ANCSA about individuals' rights to assert claims to ANCSA lands and established a comprehensive program for determining such rights, the district court correctly determined that Congress intended ANCSA to ''occupy the field'' in this area and to pre-empt common-law theories. Any attempt to supplement ANCSA with common-law remedies, such as the constructive trust theory, would alter the comprehensive legislative scheme adopted by Congress in ANCSA, rather than to ''fill a gap'' that Congress has not occupied. 629 F.Supp. at 729, citing *City of Milwaukee v. Illinois,* 451 U.S. 304, 313-319 (1981).

IV. PETITIONER'S § 14(c)(1) CLAIM WAS PROPERLY DISMISSED.

Eklutna's Opposition to Petition for Writ of Certiorari in the related case of *Lee v. Eklutna, Inc.,* No. 88-549, discusses in detail why ANCSA § 14(c)(1) should not be construed to benefit trespassers such as Donnelly at the expense of the intended beneficiaries of ANCSA, the Alaska Natives, and why the court of appeals correctly held that the United States is an indispensable party to such a claim when, as here, it arises from a homestead claim. That discussion is incorporated by reference into this Opposition and will not be repeated *in toto.*

A. ANCSA WAS INTENDED TO BENEFIT NATIVES, NOT TRESPASSERS

ANCSA was enacted as a comprehensive settlement of the claims of Alaska Natives based upon aboriginal

title. 43 U.S.C. 1601(a); 117 Cong. Record 4678, 46785-86, 46788 (Dec. 14, 1971). Its overall purpose is to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal claims . . ." 43 U.S.C. 1601(a). Congress further intended that ANCSA be liberally interpreted in favor of the Natives. *Cape Fox Corp. v. United States*, 4 Cl.Ct. 223, 231 n. 11 (1983). Notwithstanding the fact that it is absurd to contend that a comprehensive statute enacted to settle Native claims somehow grants rights to a trespasser like Donnelly, he argues that "legal or illegal, occupancy . . . alone is the sole condition" to a reconveyance under § 14(c)(1). Petition at 21.

Although the language of § 14(c)(1) contains only a reference to occupancy, it is "a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *California Fed. Sav. and Loan Ass'n. v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 691 (1987), quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). As in all cases of statutory construction, this Court's task is to interpret the words of the statute in light of the purposes Congress sought to serve. *Norfolk Redev. and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983).

ANCSA was never designed to be remedial legislation for failed homesteaders. Since ANCSA was enacted for the purpose of remedying prior wrongs and neglect suffered by the Native peoples of Alaska, it must be construed in light of this purpose. But if Donnelly is correct in asserting that § 14(c)(1) applies in this situation, then

every rejected homestead entryman, every unsuccessful applicant for a trade and manufacturing site or headquarters site, and every person who has failed to lawfully acquire a small tract entry, will have vested rights under § 14(c)(1).

Even worse, under the Donnelly's interpretation, willful trespass and knowing violation of the public land laws would be rewarded under § 14(c)(1). Those, like Donnelly, who stay in spite of the rejection of their unlawful entries, trespass notice, and full knowledge that they have no right to entry or occupancy, would be entitled to benefits under § 14(c)(1).

Thus, Donnelly's interpretation of § 14(c)(1) is not just inconsistent with the spirit of ANCSA, it would actually defeat the basic intent of the Act.

B. THE DISPUTED LAND WAS AT ALL TIMES WITHDRAWN FROM ENTRY AND OCCUPANCY.

Donnelly contends that his occupancy was legal because it was not forbidden by § 24 of the FPA. However, the disputed land was at all material times closed to public entry and thus not open to homesteading, and Donnelly was aware of the closed status of the disputed land. *Supra* at 2-7. Donnelly attempts to argue that his trespassing was valid occupancy and cites *Watt v. Western Nuclear,* 462 U.S. 36, 48-50 (1983), for the proposition that § 24 of the FPA should not be construed to direct one land use to the exclusion of other uses. However, the Act at issue in *Watt* expressly reserved mineral rights to the United States and simultaneously provided for homesteading on the surface of the lands. "Congress' purpose in

severing the surface estate was to encourage the concurrent development of both the surface and subsurface of [the] lands." *Id.* at 50. This is hardly analogous to the *withdrawal* of public lands from public entry as provided in the FPA.

C. THE ALASKA SUPREME COURT HAS NOT HELD THAT § 14(c)(1) OFFERS AMNESTY TO TRESPASSERS.

Donnelly maintains that court of appeals wrongfully added a condition of legal occupancy (in Donnelly's case, under the homestead laws, because that is how his claim arose) to § 14(c)(1). Petition at 18-23. He argues that in *Hakala v. Atxam Corporation,* 753 P.2d 1144 (Alaska 1988), the Supreme Court of Alaska has adopted a reading of § 14(c)(1) that did not impose such a condition. Donnelly implies that the decision in *Hakala* is in conflict with the court of appeals' decision in this case.

Donnelly's characterization of the *Hakala* case is erroneous, because the Alaska Supreme Court found that legal occupancy was a condition to a § 14(c)(1) claim. In *Hakala,* the Alaska Supreme Court held that a hunting guide was entitled to a § 14(c)(1) reconveyance for a cabin used as a primary place of business. The Alaska Supreme Court saw "the primary issue" as being "how the court should interpret the phrase 'a primary place of business' as contained in § 14(c)(1) of ANCSA." 753 P.2d at 1147. The court perceived the phrase "a primary place of business" as effectuating Congress' intent to protect a "wide array of existing legitimate businesses," those who were using the lands in "an *established, legal* and *routine* fashion." (Emphasis added.) *Id.* The court in *Hakala* was

apparently not confronted with a trespasser or a claimant who was otherwise on the land illegally. Even so, the Alaska court clearly required that a claimant under § 14(c)(1) must be legally on the land, a status which Donnelly did not have.

In a very recent decision, the Ninth Circuit has noted that *Hakala* is consistent with an interpretation of § 14(c)(1) that denies a right of reconveyance to illegal occupants but grants a right to legal occupants. *Buettner v. Kavilco, Inc.*, — F.2d —, 1988 West Law 111344 (October 26, 1988) (9th Cir. 1988). Both *Hakala* and *Buettner* are discussed in detail in Eklutna's Opposition to Petition for Certiorari in *Lee v. Eklutna, Inc.*, No. 88-549.

D. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO DONNELLY'S § 14(c)(1) CLAIM TO A HOMESTEAD.

Eklutna relies on its discussion of this point in its Opposition to Writ of Certiorari in *Lee v. Eklutna, Inc.*, no. 88-549. That discussion includes an analysis of Fed. R. Civ. P. 19(a) and 19(b) which parallels the discussion in this brief at pp. 13-16.

V. THE DECISION BELOW WAS JUSTLY DECIDED AND IS OF LIMITED IMPACT.

Although of great importance to Eklutna, this case will have no practical impact outside the State of Alaska. Even within the state, its impact will be limited to failed homesteaders and illegal occupants of lands conveyed to Native Corporations. Eklutna does not know how many such persons there are, but there are almost certainly not

the "thousands" Petitioner alleges (Petition at 25) without the slightest shred of evidence in the record.

This case involves nothing more than the argument of a failed homesteader that ANCSA, which was enacted for the benefit of Alaska's Natives, provides him with amnesty from his failure to comply with the provisions of federal law concerning homesteads and, thereby, entitles him to 92.5 acres in addition to the 67.5 he has already received. The district court's and the court of appeal's decisions barring his stale claims, refusing to grant a trespasser rights under ANCSA at the expense of Alaska's Natives, and disallowing an attempt to litigate against a Native Village Corporation claims that rightfully should have been timely brought against the United States, are—just and fair.

—o—

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID P. WOLF
JAMES S. CRANE
Counsel for Respondent, Eklutna, Inc.
COPELAND, LANDYE, BENNETT AND WOLF
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

APPENDIX

43 U.S.C. 1603. Declaration of Settlement

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

43 U.S.C. 1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

43 U.S.C. 1610. Withdrawal of public lands

(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(1) The Native villages subject to this chapter are as follows:

NAME OF PLACE AND REGION

* * * *

Eklutna, Cook Inlet

43 U.S.C. 1611. Native Land Selection

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided,* that no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610(a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further,* That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation for that region may select the subsurface estate in an equal acreage from other lands withdrawn by section 1610(a) of this title within the region, if possible.

Federal Rule of Civil Procedure 19.

Joinder of Persons Needed for Just Adjudication.

(*a*) *Persons To Be Joined If Feasible.* A person who is subject to service to process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of action in the person's absence may (i) practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person

should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(*b*) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

MOTION FILED
DEC 5 1988

(4)

No. 88-533

In the
Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, *et al*, PETITIONER,

v.

EKLUTNA, INC., *et al*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Motion for Leave to File Brief as *Amicus Curiae* and Brief of Fifty-Nine Alaska 14(c) Claimants as *Amicus Curiae* in Support of Petition

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G. KENT EDWARDS, *Esq.*
HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

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26 pp

88-533

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

THERESE U. DONNELLY, et al., PETITIONER,

v.

EKLUTNA, INC., et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF 59 ANCSA 14(c) CLAIMANTS
IN SUPPORT OF PETITIONERS

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, ANCSA 14(c) Claimants[1/] respectfully move for leave to file the attached brief Amicus Curiae; in support of the Petitions filed by Donnelly and Lee.

1/ Alan Abramson, Michelle Abramson, L. Ann Barker, William H. Barker, Bernard P. Burkholder, Jody M. Burkholder, Marianne Burkholder, Nina Lee Burkholder, Becky A. Carlson, Stanley D. Carlson, D. Chester Cantley, Esther E. Cantley, Donna J.

(Footnote continued on following page)

The Solicitor General has consented to such participation as Amicus Curiae. A copy of his consent is attached as Exhibit "A". Eklutna would not give its consent. No explanation was given. Consequently, this motion is submitted and supported by the following points:

1. Said fifty-nine individuals and companies have 14(c) claims under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq ("ANCSA). The Ninth

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(footnote continued from preceding page)

Darrough, Robert D. Darrough, David W. Dieters, Rita R. Dieters, Benton A. Evans, Chuck Evans, Fields & Sons, Inc., Dewitt Fields, Duncan S. Fields, Wallace W. Fields, Wanda A. Fields, Weston W. Fields, Joy L. Guthrie, Richard L. Guthrie, JoAnn M. Graves, Stanley R. Graves, Clistia Jones, Elisabeth Kouremetis, Leo Kouremetis, Patrick J. Killion, Sandra C. Killion, Patricia A. Kust, Peter J. Kust, Marla Krigbaum, Morris C. Krigbaum, John E. Libby, Phyllis L. Libby, Frances Bruce Luque, Tana Cochran-Luque, Kathryn Madson, Richard R. Madson, Blanche L. Murphy, Jane E. Nuttall, John P. Nuttall, Mary Jo Nuttall, Michael J. Nuttall, Celestine O. Omlid, Darlene L. Omlid, Oluf K. Omlid, Sid M. Omlid, James R. Pryor, Donald P. Sagmoen, Helen E. Sagmoen, Claude D. Slater, Togiak Fisheries, Inc., Clarence Wren, and V. May Wren.

Circuit's decision in the above-referenced matter, exposes each of them, and all others similarly situated, to eviction from their homes or business property which they and their predecessors-in-interest have occupied for over twenty years. Unlike Donnelly or Lee, the Amicus Curiae are not failed homesteaders; none were the subject of eviction efforts by the U.S. Government. Most are operators of commercial fishing sites; all have spent considerable money improving their remote property, much of it in reliance on the language of ANCSA 14(c).

2. Amicus Curiae participation will help provide insight as to the significance of the ANCSA issues not only to all ANCSA 14(c) claimants; but to all Americans on whose behalf Congress made the historic Alaska Native Land Settlement.

3. The joint Donnelly and Lee decision is a case of first impression on ANCSA 14(c) issues. Until overruled or distinguished, it will control the outcome

of untold thousands of pending and potential 14(c) claims. If this Court does not correct the Ninth Circuit's decision at this time and set forth policy guidelines for ANCSA 14(c) claims, it will be too late to do so in future cases. The result will be uncorrectable damage and injustice since few, if any, of such claimants can afford the cost of taking their ANCSA 14(c) claims all the way through the federal judicial system in the face of the Donnelly/Lee decision on the mere hope this Court will grant review in their own cases.

4. The interests of the fifty-nine 14(c) Claimants differ from that of Petitioners, in that Donnelly/Lee were principally interested in obtaining broader relief in the courts below under the Homestead Act in order to receive title to more acreage than would be the case under ANSCA 14(c). The order and emphasis of the issues in both the briefs and decisions below reflect such different focus. The

interest of the fifty-nine Claimants is limited solely to the ANSCA 14(c) issue, an issue which has thus far been treated as an afterthought, despite its crucial importance and far reaching ramifications.

5. Counsel for the Amicus Curiae was Alaska's Attorney General when the Alaska Native Claims Settlement Act ("ANCSA") legislation was originally working its way through Congress. He is familiar with its legislative history. To date the courts below have rendered their decisions without the benefit of highly relevant legislative history which supports a conclusion contrary to that reached by the Ninth Circuit.

Respectfully submitted,

G. Kent Edwards, Esq.
HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS

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ANCHORAGE, ALASKA

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

October 17, 1988

G. Kent Edwards
Hartig, Rhodes, Norman, Mahoney & Edwards
717 K Street
Anchorage, Alaska 99501-3397

Re: Donnelly v. Eklutna, et al., No. 88-533

Lee v. Eklutna, et al., No. 88-549

Dear Mr. Edwards:

This is in response to your letter of October 14, 1988.

On behalf of the federal parties I hereby consent to the filing of an amicus curiae brief on behalf of the forty two Alaska Native Claims Settlement Act claimants in the above cases.

Sincerely,

Charles Fried

Charles Fried
Solicitor General

EXHIBIT "A"

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QUESTIONS PRESENTED

1. In passing the Alaska Native Claims Settlement Act ("ANCSA") did Congress intend that Native and non-native squatters be dispossessed of their places of residence and business even though they, or their predecessors-in-interest, occupied the lands before December 1971 in the manner specified for conveyance eligibility under Section 14(c) of that Act?

2. Did Congress intend that the United States of America be treated as an indispensable party in ANSCA 14(c) claim cases?

3. Did Congress intend that ANCSA 14(c) claims be governed by the statute of limitations contained in the Quiet Title Act, 28 U.S.C. 2409a(g), rather than that contained in 43 U.S.C. 1632(b)?

INTEREST OF THE 59 ALASKAN AMICUS CURIAE

The interest of the fifty-nine Alaska Alaska Native Claims Settlement Act 14(c) claimants[1/] (hereinafter "ANCSA claimants") requesting permission to appear as Amicus Curiae, is set forth in their Motion For Permission To Appear, which statements are incorporated herein by reference.

1/ Alan Abramson, Michelle Abramson, L. Ann Barker, William H. Barker, Bernard P. Burkholder, Jody M. Burkholder, Marianne Burkholder, Nina Lee Burkholder, Becky A. Carlson, Stanley D. Carlson, D. Chester Cantley, Esther E. Cantley, Donna J. Darrough, Robert D. Darrough, David W. Dieters, Rita R. Dieters, Benton A. Evans, Chuck Evans, Fields & Sons, Inc., Dewitt Fields, Duncan S. Fields, Wallace W. Fields, Wanda A. Fields, Weston W. Fields, Joy L. Guthrie, Richard L. Guthrie, JoAnn M. Graves, Stanley R. Graves, Clistia Jones, Elisabeth Kouremetis, Leo Kouremetis, Patrick J. Killion, Sandra C. Killion, Patricia A. Kust, Peter J. Kust, Marla Krigbaum, Morris C. Krigbaum, John E. Libby, Phyllis L. Libby, Frances Bruce Luque, Tana Cochran-Luque, Kathryn Madson, Richard R. Madson, Blanche L. Murphy, Jane E. Nuttall, John P. Nuttall, Mary Jo Nuttall, Michael J. Nuttall, Celestine O. Omlid, Darlene L. Omlid, Oluf K. Omlid, Sid M. Omlid, James R. Pryor, Donald P. Sagmoen, Helen E. Sagmoen, Claude D. Slater, Togiak Fisheries, Inc., Clarence Wren, and V. May Wren.

REASONS FOR GRANTING CERTIORARI AND SUMMARILY REVERSING.

A THE NINTH CIRCUIT'S 14(c) HOLDINGS WERE MADE WITHOUT BENEFIT OF HIGHLY RELEVANT LEGISLATIVE HISTORY WHICH SUPPORTS A CONTRARY RESULT.

A review of the briefs below and resulting court decision indicate that the Ninth Circuit was unaware of the relevant legislative history of ANCSA 14(c). [43 U.S.C. 1613(c)] That history can be found in Hearing before the Committee on Interior and Insular Affairs, U.S. Senate 91st, Cong., 1st Sess., on S. 1830 [hereinafter Senate Bill 1830]. Senate Bill 1830 was the legislative stone from which the ANCSA settlement was carved by Congress.

The legislative history of Senate Bill 1830 confirms that it was deemed essential to the structure of the settlement that nobody be dispossessed from their home, businesses, or subsistence camp sites located upon the ANCSA settlement lands.

Section 14(c) ANCSA has its origin in Section 10(a) of Senate Bill 1830. That section provides in pertinent part:

> Upon completion of surveys required by section 9 of this Act, the secretary is authorized to issue a patent to the surface of any public lands within the areas withdrawn under the Act to the individual or organization occupying such land at the time of the survey. (emphasis added) Hearing before The Committee on Interior and Insular Affairs, U.S. Senate, 91st Congress, 1st Sess., on S. 1830, p. 29.

At the Senate Interior hearing on Senate Bill 1830, Joseph H. Fitzgerald, Chairman of the task force charged with formulating a legislative resolution of the Alaska native land claims, set forth the reason for making land transfers to "occupants" rather than to a more narrowly defined group:

> The elements of any claims settlement must (1) provide to the village people the land they actually use for homes, businesses, hunting, and fishing camps, and the like; ...
>
> The elements of the proposed settlement are these:

> (1) Land used by the individuals in the villages is transferred directly to them with a minimum of red tape; the villages themselves each become eligible to select up to 36 square miles of surrounding land if they incorporate as organized communities under State law. This provision is the one most immediately important to the village people, who are now in most cases only "squatters" on Federal land. Between 3 and 6 million acres would ultimately be transferred in this way. (emphasis added) Id., p. 121,

The occupancy provision of Senate Bill 1830 was in fact a fulfillment of Section 8 of the 1884 Organic Act, 23 Stat. 24, which provides:

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.... (emphasis added)

The concept of the ANCSA settlement was to preserve the way of rural Alaska village life wherein Alaska natives and non-natives live together, rather than in segregated fashion of the traditional "Lower 48" Indian Reservations. At stated by Mr. Fitzgerald at the Senate Interior Hearings:

> We also believe that one of the great problems in Alaska is that it is on the very threshold of its development, and it would be unwise in Alaska to create today nearly 200 reservations, one for each of the small villages in the State. Alaska today is an open society, its communities are open, while we talk about open villages, these are not closed villages. White people, other people live there too. And it would be very desirable in the long-range political future of Alaska to keep it this way. And it is this kind of concept we have tried to bring to our proposals. Id., p. 126.

It was this "open society" philosophy which was the basis for allowing "squatters" to receive reconveyances.

Given the language of the 1884 Organic Act and Senate Bill 1830, the source of the "occupancy" provision in ANCSA is unmistakable.

The conclusion that Congress did not intend to exclude "squatters" from ANCSA 14(c) reconveyance rights is further supported by the fact that in 1971, when Congress passed ANCSA, there was no statute penalizing erection of cabins on public lands. Even at the present time no penalty

exists under either the Federal Public Land Policy and Management Act, 43 U.S.C. 1701, et seq., or 43 C.F.R. 9230 for the unauthorized erection of cabins. Consequently, "squatter" occupancy arguably is not so egregious as to warrant a conclusion that Congress was unlikely to have granted them title rights.

B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE ALASKA SUPREME COURT IN HAKALA v. ATXAM CORP.

The Ninth Circuit's holding below is contrary to the unanimous holding of the Alaska Supreme Court in the case of Hakala v. Atxam Corp., 753 P.2d 1144 (Alaska 1988). In Hakala, Atxam sued two hunting game guides, George Kitchen and S. Hakala, in Alaska State Court for trespass based on the construction of a cabin, and engaging in game guide activities on Atxam ANSCA lands. Rather than remove the case to federal court, Hakala and Kitchen defended the case in the Alaska state courts based on their ANCSA 14(c) claim rights, and prevailed.

The Alaska Supreme Court stated:

> We do not, however, believe that Congress intended under ANCSA to convey lands to native corporations to the exclusion of those who had previously utilized the lands in an established, legal and routine fashion. Otherwise, we can find no reason for Congress to have included the reconveyance clause in § 14(c)(1). Thus, we believe that in § 14(c)(1), Congress intended to protect the existing rights of those using lands which would later become subject to an interim conveyance under ANCSA. Accordingly, we adopt an interpretation of the phrase "a primary place of business" which effectuates Congress' intent to protect a wide array of existing legitimate businesses. Id., 1147.

It went on to note:

> In interpreting the phrase "a primary place of business," we are particularly mindful of the statutory context in which that phrase appears. Most of the lands subject to conveyance under ANCSA are remote lands, outside the confines of cities, towns and villages. In drafting Section 14(c)(1), Congress must have had in mind those particular lands, and the nature of the particular businesses that are ordinarily conducted on those lands. Much of that business is seasonal, and involves the use of structures that can hardly be considered permanent.... Id., 1148.

Consequently, the Alaska Supreme Court found that Kitchen had a 14(c) claim to that portion of Atxam's ANCSA lands where Kitchen

had erected a small garage type structure made of plastic and metal for his bear hunting operations in the area, even though (1) the structure had only been used during part of a two week period in May and two weeks in October each year, (2) the structure had only been used for 2 out of 20 hunts in 1971, (3) Kitchen usually guided elsewhere out of Teller, Kotzebue and in the Wrangell and Talkeetna mountains, and (4) no pre-1971 federal permit or other vested right was stated to have been held by Kitchen or Hakala.

Since ANCSA 14(c) will only arise either in federal courts within the Ninth Circuit or in the Alaska state courts, this Court should resolve the existing conflict.

C. THE NINTH CIRCUIT'S DECISION RENDERS ANCSA 14(c) MEANINGLESS.

By holding that the Section 14(c)(1) of ANCSA does not apply to technical trespassers on federal lands, the court has rendered

14(c)(1) meaningless. Under the Ninth Circuit's construction 14(c)(1) would be redundant to Sections 11(a), 14(g), and 22(b) of ANCSA. [43 U.S.C. § 1610(a), 1613(g), and 1621(b)]. The latter sections protect non-trespassers who had formal vested land rights granted by the United States before ANCSA's enactment.

D. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE DEPARTMENT OF INTERIOR IN APPEAL OF THEODORE J. ALMASY.

The Department of Interior's Alaska Native Claims Appeal Board ("ANCAB") held in Appeal of Theodore J. Almasy, 87 I.D. 81, 85 (February 27, 1980) that ANCSA 14(c)

> ... protects certain land uses based on occupancy alone, without requiring a claim of title or of a lesser interest derived from contract entry under the public land laws or other authorization.

It is well established that "... great deference should be given to the interpretation that the Secretary of the Interior

places on the statutes which he administers." Alaska Miners v. Andrus, 662 F.2d 577, 579 (9th Cir. 1981). Similar deference should be accorded the Almasy decision because ANCAB was chartered under the jurisdiction of the Secretary of Interior.

E. ANCSA 14(c) RIGHTS ARE NOT IMPAIRED BY WITHDRAWAL FOR PURPOSES OTHER THAN NATIONAL PARKS OR MILITARY DEFENSE.

The Ninth Circuit erred when it stated "... there was no indication of legislative intent to override the established principal that individuals could obtain no rights to withdrawn lands." [See, pps. 15(a) - 16(a) of Petitioners' Joint Appendix]

At the time of ANCSA's enactment most federal lands in Alaska were in a withdrawn status due to Secretary Udall's Public Land Law Order 4582 (the so-called "Alaska Land Freeze"). [See, also, 43 U.S.C. 1616(d)(2) (1971)] ANCSA also withdrew from appropriation or entry under the public land laws,

the entire area proposed for native land conveyances. 43 U.S.C. 1610 (1971) Consequently, the lands conveyed under ANCSA were all withdrawn lands. Congress clearly stated in 43 U.S.C. 1610 that the only public lands not subject to conveyance under ANCSA were the National Park System lands and military withdrawals.

Because Congress permitted the conveyance to ANCSA corporations of all withdrawn lands, with the above two exceptions, the conclusion that ANCSA prohibits the reconveyance of the same lands to occupants is illogical, particularly since the reconveyances are from ANCSA corporations not directly from the United States. Further support for this contention is found in the ANCSA definition of "Public Lands" under 43 U.S.C. § 1602(e) which provides:

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary,

> enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;...

F. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY IN ANCSA 14(c) ACTIONS BETWEEN OCCUPANTS AND NATIVE CORPORATIONS.

The Ninth Circuit erroneously held that 14(c)(1) claims cannot be resolved in any action to which the United States is not a party apparently on the belief that the government must play some role in the adjudication process. A similar argument, i.e. that the Secretary of Interior must take an an active role in adjudicating validity of the rights to which ANCSA conveyance lands are subject, was rejected in the case of Alaska Miners v. Andrus, 662 F.2d at 580.

The U.S. is not required to decide 14(c) issues. ANCSA only requires that the

Secretary make a survey, nothing else. 43 U.S.C. 1612. The Secretary need not decide anything regarding the validity of ANCSA 14(c) claims. That dispute is between the Native corporations and ANCSA 14(c) claimants. [See attached BLM Notice so proclaiming, Exhibit "B"] Congress merely left such issues open for either agreement by the parties or, in the absence of such agreement, for decision by the court. Reconveyance to a specified group of occupants is a ministerial function, not a discretionary one. The types of occupany which qualify are clearly specified in the statute, "... a primary place of business, a primary place of residence, subsistence camp site or reindeer husbandry." 43 U.S.C. 1613(a)(1)

G. THE QUIET TITLE ACT STATUTE OF LIMITATIONS IS NOT APPLICABLE.

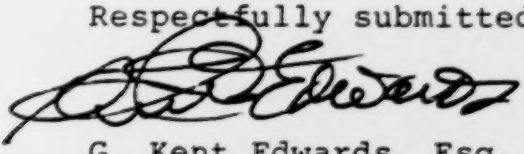
Under the Ninth Circuit's reasoning, all ANCSA 14(c) claims would have been time

barred by the twelve year statute of limitation contained in the Quiet Title Act, 28 U.S.C. 2409a(g). Interestingly, The Quiet Title Act was not even law when ANCSA was enacted. Moreover, Congress has clearly specified that ANCSA 14(c) claims are to be governed by 43 U.S.C. 1632(b) which provides for a statute of limitations of "... one year after the date of filing of the map of boundaries as provided for in regulations promulgated by the Secretary." Such map of boundaries have not been filed yet for most ANCSA settlement land areas. By starting with the premise that 43 U.S.C. 1632(b) controls, one is led to the conclusion that 28 U.S.C. 2409a(g) does not apply and, therefore, the U.S. Government was not considered by Congress to be an indispensable party.

CONCLUSION

The Petition For Writ Of Certiorari should be granted and the Ninth Circuit's decision summarily reversed. To do otherwise would be to subject most occupants of rural native village lands to the ejectment whims of the Native corporations in title; thereby defeating one of the principal land claim settlement goals of Congress - the preservation of an open village society as it existed in 1971.

Respectfully submitted,



G. Kent Edwards, Esq.
HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

BLM

PUBLIC NOTICE TO VILLAGE RESIDENTS

Each village corporation listed below has now officially filed with the Bureau of Land Management (BLM) a map of the village boundaries. This map shows all *or part of* the parcels of land the village corporation has identified as qualifying for transfer of ownership, such as houses, businesses, etc., under Section 14(c) of the Alaska Native Claims Settlement Act (ANCSA). 43 USC 1613(c). This section of the Act requires the village corporation to identify and convey to any Native or non-Native occupant, title to the surface estate in the tract occupied in 1971 as a primary place of residence, primary place of business, subsistence campsite, headquarters for reindeer husbandry, or for certain other specified purposes.

If you have an interest in such land, you should contact the village corporation to review the map of boundaries to be sure the map includes your claim.

VILLAGE: CORPORATION

Nelson Lagoon: Nelson Lagoon Corporation

The official filing date of the map of boundaries is:

June 18, 1987

Federal regulations state that any conflicts among potential transferees or between the village corporation and such transferees are to be resolved before the map is submitted to BLM. 43 CFR 2650.5-4 (c) (1).

The Bureau of Land Management does not have any authority to adjudicate transfer decisions. Any disputes over 14(c) transfers must be resolved between the village corporation and the individual.

If you disagree with the village corporation's boundary decisions, you should contact the corporation. If the disagreement is not resolved, you must start a court action *within one year of the date shown above.* If you have a dispute and do not start a court action within one year, you will forfeit your claim. Alaska National Interest Lands Conservation Act (ANILCA), Sec. 902(b).

Thursday, June 18, 1987, The Anchorage Times

Exhibit "B"

(5) (4)

Nos. 88-533 and 88-549

FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, PETITIONER

v.

EKLUTNA, INC., ET AL.

JAMES W. LEE, PETITIONER

v.

EKLUTNA, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
EDWARD J. SHAWAKER
VICKI L. PLAUT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

28 pp

QUESTIONS PRESENTED

1. Whether petitioner Donnelly's suit against the United States claiming title to land under the homestead laws is barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g) (Supp. IV).

2. Whether the United States is an indispensable party to petitioner Donnelly's quiet title suit against the respondent Alaska Native corporations that hold the disputed land under patents issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*

3. Whether a person who is a trespasser on federal land that previously was withdrawn for a special federal purpose and then was patented to a Native corporation under ANCSA can obtain title to the surface estate under Section 14(c) of ANCSA.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-533

THERESE U. DONNELLY, PETITIONER

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No. 88-549

JAMES W. LEE, PETITIONER

v.

EKLUTNA, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-17a) is reported at 850 F.2d 1313. The opinions and findings of the district court (Pet. App. 18a-86a) are unreported.

JURISDICTION

The decision of the court of appeals was rendered on March 10, 1988, and a timely petition for rehearing was denied on June 27, 1988 (Pet. App. 4a, 94a-97a). The peti-

tion for a writ of certiorari was filed on September 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases concern the ownership of several parcels of land in the Eagle River Valley near Anchorage, Alaska. The parcels in question are part of a tract that was patented by the United States in 1979 to respondent Eklutna, a Native corporation that was established under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* Prior to 1979, however, the land was included in Power Site Classifications 107 and 399, which were issued in 1925 and 1950, respectively, pursuant to 43 U.S.C. 31 and Section 24 of the Federal Power Act, 16 U.S.C. 818. Pet. App. 18a-19a. The background of these two cases is essentially identical to that of *Lee* v. *United States*, 629 F. Supp. 721 (D. Alaska 1985), aff'd, 809 F.2d 1406 (9th Cir. 1987), cert. denied, No. 87-642 (Jan. 27, 1988) [hereinafter *Lee I*], and No. 88-549 involves the same petitioner and the same parcel of land as *Lee I*.

1. Section 24 of the Federal Power Act provides that land included in a proposed power project site shall be "reserved from entry, location, and other disposal under the laws of the United States * * *." The issuance of Classifications 107 and 399 therefore had the effect of withdrawing the parcels at issue in this case from entry under the public land laws. Section 24 of the Federal Power Act further provides that if the Federal Power Commission (FPC)[1] determines that any of the land set

[1] The FPC has been abolished and its duties transferred to the Secretary of Energy and the Federal Energy Regulatory Commission. See 42 U.S.C. 7151(b), 7171(a), 7172(a), 7291 and 7293.

aside for a power site will not be injured or destroyed for purposes of power development if it is made available for location, entry, or selection under the public land laws, the Secretary of the Interior, after giving 90 days' notice to the Governor of the State, shall declare the land open to entry under those laws. In 1952, the FPC determined that certain of the land covered by Power Site Classifications 107 and 399 would not be injured for purposes of power development by location or entry under the public land laws. However, the Secretary of the Interior did not thereafter revoke the withdrawal and declare the land open for entry or settlement. Pet. App. 5a.[2]

In 1957, petitioner Donnelly[3] and petitioner Lee moved onto separate tracts of land in the Eagle River Valley, with the expectation of homesteading those tracts. Some of the land on which each petitioner settled was open for homesteading. However, in 1957 and 1958, the Bureau of Land Management (BLM) informed petitioners that other portions of the proposed homestead sites—the portions at issue here—were within the power site classifications and for that reason would not be available until BLM formally opened them for entry. Although petitioners were invited to appeal, they did not do so. Pet. App. 34a, 63a-65a; *Lee I*, 809 F.2d at 1407.

Petitioners Donnelly and Lee did, however, file renewed homestead applications for the same parcels. At the same time, petitioners resorted to political channels, joining with other would-be homesteaders in the area in writing to members of the Alaska congressional delegation and to

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 88-533.

[3] Upon his death, Joseph F. Donnelly, the original party in interest, was succeeded by his wife, Therese U. Donnelly. For ease of reference, however, we refer to Joseph Donnelly as "petitioner."

the Secretary of the Interior. Responding to these inquiries, both the Director of BLM and the Assistant Secretary of the Interior reiterated that petitioners had no rights in land within the power-site withdrawal. The Director of BLM explained to Delegate (later Senator) Bartlett that "[i]n the absence of special legislation, we know of no way of assuring the Lees and the Donnellys of continued occupancy of the lands for homestead purposes. Any settlement on power-site lands which have not been opened to entry is a trespass against the United States and no rights can be gained thereby" (Pet. App. 67a-68a). The Assistant Secretary also informed a representative of homestead applicants in the area that portions of their proposed homestead sites were not open to entry; that further action by the Department of the Interior with respect to the land would have to await completion of an engineering survey; and that even if the power-site withdrawal were revoked, the State of Alaska and veterans would have preference rights (*id.* at 36a, 69a-70a, 113a-114a; *Lee I,* 809 F.2d at 1407). In 1959, BLM informed petitioner Donnelly that his second homestead application was invalid and that "any use or occupancy of these lands will constitute a trespass against the United States" (Pet. App. 70a-71a; see also *id.* at 35a). Donnelly once again did not take an appeal pursuant to administrative procedures (*id.* at 71a-72a). Petitioner Lee's application was similarly rejected in 1961 (*id.* at 36a).

In 1961, after publishing notice in the Federal Register, BLM filed a platted survey of the area that delineated, inter alia, the boundaries of Classifications 107 and 399 in relation to the potential homestead sites selected by petitioners. 26 Fed. Reg. 2486. Soon thereafter, BLM notified petitioner Donnelly that upon finalization of the survey, it would permit him to file a renewed homestead application for the land outside the power-site withdrawal (Pet. App.

72a-74a). BLM made clear, however, that "[t]his notice is not to be construed as granting any rights or concessions to the withdrawn lands" (*id.* at 73a). In 1964, both petitioners entered into compromise arrangements with BLM that enabled them to submit proof of occupancy for those portions of the proposed homestead entries that were located outside the withdrawal area and to receive patents from the United States for those portions (*id.* at 13a-14a, 37a). Under this arrangement, petitioner Donnelly received a patent to 67.5 acres of the land in his original 160-acre homestead claim and petitioner Lee received a patent to 95 acres of his original 160-acre claim (*id.* at 6a, 38a). The instant petitions concern only the portions of the 160-acre sites selected by Donnelly and Lee that were within the power-site withdrawal area.

2. On December 18, 1971, Congress enacted ANCSA, which was intended to settle the aboriginal land claims of Native Alaskans. Under Section 4 of the ANCSA, 43 U.S.C. 1603, all claims of aboriginal title in Alaska were extinguished. See *Amoco Production Co.* v. *Village of Gambell*, No 85-1239 (Mar. 24, 1987), slip op. 3-4. At the same time, Congress provided for regional and village Native corporations organized under ANCSA to select and receive title to public land in Alaska, including land within certain power-site withdrawals. See 43 U.S.C. 1602(e), 1610-1614.[4] In addition, Section 22(b) of ANCSA

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[4] ANCSA permits each Native village corporation to select a minimum of 69,120 acres of public land from lands withdrawn under the Act. 43 U.S.C. 1611(a)(1), 1613(a). ANCSA defines "public land" as "all Federal lands and interests therein located in Alaska," except the smallest practicable tract surrounding any federal facility and land selected by the State of Alaska under its Statehood Act. 43 U.S.C. 1602(e). Power-site withdrawals are "public land" under this definition, and they therefore may be selected by a Native corporation under ANCSA.

directed the Secretary of the Interior to issue patents to all persons who had made lawful entry in compliance with the public land laws for the purpose of gaining title to homesteads, headquarter sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 1621(b)). These patents were to issue promptly after ANCSA was passed, so that the Native corporations could select lands with the assurance that they would not be patented to others.

Pursuant to Section 14 of ANCSA, 43 U.S.C. 1613, the Native village corporation of Eklutna filed a land selection that included the parcels at issue here. In 1979, the United States issued Eklutna a patent to the surface estate in the land and issued respondent Cook Inlet Region, Inc., the regional Native corporation for the area, a corresponding patent to the subsurface estate. *Lee I,* 809 F.2d at 1408.

3. a. In 1975, the United States filed a trespass action against petitioner Donnelly with respect to the 92.5 acres he claimed within the power-site withdrawal. Later that year, Donnelly filed a counterclaim against the United States under the Quiet Title Act (QTA), 28 U.S.C. 2409a, seeking to quiet title to the disputed land in himself. In 1979, after the United States patented the land to Eklutna under ANCSA, petitioner also filed a counterclaim against Eklutna (which had intervened to protect its interest in the disputed land), as well as a second amended counterclaim against the United States. In its final form, petitioner Donnelly's counterclaim against the United States sought to (i) quiet title in petitioner to the portion of the Native corporation's land for which petitioner had sought to make a homestead entry some years earlier; (ii) force the Department of the Interior to invalidate Eklutna's patent for the same land, accept petitioner's homestead application, and patent the land to Donnelly instead; and (iii) enjoin the government from disturbing his use and occupancy of the land. Petitioner Lee also filed a direct action

against the United States and Eklutna raising similar claims.

b. On January 25, 1980, after the United States patented the disputed land to Eklutna, the district court granted the government's motion to dismiss its trespass claim against Donnelly. Pet. App. 6a. Following a bench trial, the court also dismissed Donnelly's counterclaims against the United States and Eklutna (*id.* at 6a-7a). The district court held that it lacked jurisdiction over Donnelly's claim against the United States because it was barred by the 12-year statute of limitations under the QTA, now codified at 28 U.S.C. 2409a(g) (Supp. IV) (Pet. App. 23a). The district court reaffirmed that ruling in its December 5, 1986 opinion (*id.* at 50a-57a), finding that petitioner "knew or should have known of the claim of the United States" at least by 1958, when BLM rejected his original homestead entry, or, at the latest, by 1961, when BLM completed its survey covering the contested land and published notice of the survey in the Federal Register (*id.* at 52a).

The district court also rejected petitioner Donnelly's claims against respondent Eklutna (Pet. App. 31a, 32a-49a, 50a-57a). The court first dismissed petitioner's challenge to Eklutna's patent because petitioner was jurisdictionally barred by the QTA's statute of limitations from establishing that his title was valid as against the United States (*id.* at 31a, 51a n.1). The court later reaffirmed that dismissal, and further held that the federal common-law basis for petitioner's claim against respondent Eklutna had been preempted by ANCSA, and that petitioner could not assert a claim against Eklutna under Section 22(b) of ANCSA because that provision imposes duties only on the Secretary of the Interior, not on Native corporations (Pet. App. 52a-53a).[5] In a decision rendered

[5] The court noted in passing that even if petitioner Donnelly had filed a Section 22(b) claim against the Secretary, his claim would have

on January 23, 1985, the district court rejected similar claims by petitioner Lee against the United States and Eklutna. *Lee I*, 629 F. Supp. 721.

c. Finally, in a decision rendered on November 13, 1986, the district court rejected the remaining contention advanced by both Lee and Donnelly—namely, that they were entitled to receive title to the surface estate in the disputed parcels under Section 14(c)(1) of ANCSA. That Section provides that upon receipt of the patent, a village corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in a tract that was occupied as of December 18, 1971, "as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry" (43 U.S.C. 1613(c)(1)). The district court held that "mere physical presence" is not sufficient to constitute "occupancy" for purposes of Section 14(c)(1) and that Congress did not intend Section 14(c)(1) to apply to "mere[] trespassers, failed homesteaders, or land users without any vested rights prior to 1971" (Pet. App. 43a, 49a).

4. Petitioner Lee's claims against the United States and Eklutna—except for his claim against Eklutna seeking title to the surface estate under Section 14(c)(1) of ANCSA—were the subject of a separate appeal, which was decided by the court of appeals on April 17, 1987. *Lee I*, 809 F.2d 1406. In that decision, the court of appeals agreed with the district court that petitioner Lee's suit against the United States was barred by the 12-year statute of limitations in the QTA, because he knew or should have known of the United States' claim by 1961, when the notice

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been barred by the QTA's 12-year statute of limitations (Pet. App. 53a n. 2).

of survey was published in the Federal Register (809 F.2d at 1410). The court of appeals also affirmed the district court's dismissal of Lee's action against Eklutna to quiet title to the 65 acres Lee claimed within the power-site withdrawal, on the ground that the United States was an indispensable party that could not be joined because of the bar created by the QTA's 12-year statute of limitations (*id.* at 1410-1411). This Court denied Lee's petition for a writ of certiorari seeking review of these rulings by the court of appeals in *Lee I (Lee* v. *Eklutna, Inc.*, No. 87-642 (Jan. 27, 1988)), and Lee (unlike Donnelly) no longer challenges those rulings.

5. The decision of the court of appeals at issue here was rendered almost a year later, on March 10, 1988 (Pet. App. 1a-17a). In that decision, the court first affirmed the district court's dismissal of petitioner Donnelly's quiet title claims against the United States and Eklutna, which were essentially identical to those rejected in *Lee I*. Adopting its reasoning in *Lee I*, the court held that Donnelly's action against the United States is barred by the 12-year statute of limitations under the QTA, since he knew or should have known of the United States' adverse claim when the notice of survey was published in the Federal Register in 1961 (*id.* at 11a-14a), and that Donnelly's title action againt Eklutna cannot proceed because the United States is an indispensable party that cannot be joined because of the QTA's 12-year statute of limitations (*id.* at 14a-15a).

The court of appeals also affirmed the district court's dismissal of the claims against Eklutna by both petitioner Donnelly and petitioner Lee seeking title to the surface estate of their respective parcels under Section 14(c)(1) of ANCSA (Pet. App. 15a-17a). The court held that Section 14(c)(1), which requires Native corporations to convey surface rights to certain "occupants" of land patented to

the corporations, does not operate as an "amnesty provision" for individuals who are trespassers or failed homesteaders (Pet. App. 15a). The court explained that it found "no indication of congressional intent to override the established principle that individuals could obtain no rights to withdrawn lands," and that "the congressional intent to provide a 'just and fair settlement' of native land claims is inconsistent with an interpretation of § 14(c)(1) that would reduce the land patented to native corporations in favor of trespassers" (*id.* at 15a-16a (citation and footnotes omitted)). The court of appeals acknowledged petitioners' contention that they were not trespassers because the Secretary was required to revoke the power-site withdrawal in the 1950s and issue homestead patents to them, and that they therefore had equitable title to the disputed parcels. But the court held that, under its decision in *Lee I*, the United States is an indispensable party to an action seeking to establish petitioners' equitable title and that the United States cannot be joined because of the 12-year statute of limitations under the QTA (*id.* at 16a).[6]

ARGUMENT

The court of appeals correctly held that petitioner Donnelly's quiet-title action against the United States is barred by the 12-year statute of limitations under the Quiet Title Act and that his quiet title action against respondent Eklutna is barred because the United States is an indispensable party to such a suit and cannot be joined. The court of appeals' rulings on these issues do not conflict with any

[6] The court of appeals also rejected petitioner Donnelly's "constructive trust" claim against respondent Eklutna. Relying on the district court's decision in *Lee I* (629 F. Supp. at 728-729), the court held that ANCSA "occupies the field" in this area and preempts federal common-law claims (Pet. App. 16a).

decision of this Court or of another court of appeals, and they present no question of general importance warranting review by this Court. In fact, the Court last Term denied petitioner Lee's petition for a writ of certiorari challenging the court of appeals' identical rulings in *Lee I* (*Lee* v. *Eklutna, Inc.*, No. 87-642 (Jan. 27, 1988)), and there is no reason for a different disposition here. The attempt by both petitioners to avoid the result in *Lee I* by seeking title to the surface estate of the disputed parcels under Section 14(c)(1) of ANCSA likewise does not warrant review. The court of appeals' decision denying relief under Section 14(c)(1) in the circumstances of this case does not conflict with any decision of this Court or of another court of appeals and does not involve considerations of general importance under ANCSA. The petitions for a writ of certiorari therefore should be denied.

1. Petitioner Donnelly contends (88-533 Pet. 9-18, 23-25) that he has equitable title to the 97.5-acre portion of his original homestead claim that was within the power-site withdrawal, because the Secretary of the Interior should have revoked the withdrawal in the 1950s and issued him a homestead patent to the disputed parcel. The court of appeals properly denied Donnelly relief on that claim, both against the United States and against respondent Eklutna.

a. The court of appeals correctly held that Donnelly's claim against the United States is barred by the 12-year statute of limitations in the Quiet Title Act (Pet. App. 11a-14a). Under 28 U.S.C. 2409a(g) (Supp. IV), any QTA action is barred "unless it is commenced within twelve years of the date upon which it accrued," and an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." Both courts below

found that Donnelly knew or should have known of the United States' adverse claim to the land in 1958, when BLM denied his first homestead application (Pet. App. 65a-68a); in 1959, when BLM rejected his second homestead application and notified him that continued occupancy would be a trespass against the United States (*id.* at 70a-71a); or, at the latest, in 1961, when BLM published and recorded its survey describing the disputed area as withdrawn (*id.* at 72a). See *id.* at 13a, 23a, 52a. Each of those dates was more than 12 years prior to 1975, when Donnelly first sought to have the court quiet title in him, as against the United States. Donnelly's QTA claim against the United States therefore is time-barred.

Furthermore, petitioner Donnelly's attempt to obtain relief against the United States under the QTA is essentially identical to that made by petitioner Lee but rejected by both courts below in *Lee I*. In the late 1950s, both Lee and Donnelly sought to obtain homestead patents to 160-acre parcels that included some land that was not subject to entry under the homestead laws because it had been withdrawn as a potential power site. BLM therefore denied the homestead applications of both petitioners for the full 160 acres, although both petitioners ultimately were issued homestead patents to the portions of their respective parcels that fell outside the power-site withdrawal. Despite BLM's unequivocal rejection of their applications for a patent to the land within the power-site withdrawal and the publication in the Federal Register of a survey specifically marking the scope of the United States' claim, both petitioners failed to take timely action to preserve any claims they may have had to the portions within the power-site withdrawal. This Court declined to review the holding by both courts below that Lee's quiet title claim against the United States therefore was time-

barred, and the identical fact-bound claim is no more worthy of review here.

Contrary to Donnelly's submission (88-533 Pet. 23-24), the communications with government officials after 1959 concerning his homestead entry did not constitute an administrative appeal of the Department's rejection of his application for land within the power-site withdrawal. Petitioner in fact took no appeal of BLM's rejection of his 1959 application. Indeed, in the district court, petitioner acknowledged that he knew of the government's adverse claim based on the power-site withdrawal and that he deliberately decided not to appeal: he stated that he took no appeal because he "could not be expected to repeatedly appeal a matter on which the Secretary of the Interior had spoken so conclusively in 1959" (Clerk's R. 251, at 7).

During and after 1959, Donnelly sought to obtain a different result through political, not legal channels, by writing letters to his congressional representatives and the Secretary. In every communication to or about petitioner Donnelly in response to these inquiries, the Department of the Interior reiterated that the land within the power-site withdrawal was not available for homestead entry and that continued occupancy of that land constituted a trespass against the United States. See pages 3-4, *supra*. The Department did undertake to ascertain how much of the 160-acre area sought by Donnelly fell outside the withdrawn area, so that this land—which was open to homestead entry—could be patented to him. But it was clear at all times that this undertaking by the Department did not constitute an appeal by Donnelly of the Department's rejection of his application for lands inside the withdrawn area. See 43 C.F.R. 221.1 *et seq.* (1958); *Department of the Interior Circular 1950,* 21 Fed. Reg.

1860 (Mar. 27, 1956); *Davis* v. *Nelson*, 329 F.2d 840, 847 (9th Cir. 1964).[7]

Petitioner Donnelly's related argument (88-533 Pet. 23-24) that he was entitled to individualized notice and that he therefore was not sufficiently put on notice by the March 15, 1961, publication in the Federal Register of the government's claim to the withdrawn area is also without merit. The primary purpose of the Federal Register is to furnish notice to the world of its contents, and the world is therefore charged with such notice. See 44 U.S.C. 1507; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947); *Kuehner* v. *Heckler*, 778 F.2d 152, 161 (3d Cir. 1985). See also *Government of Guam* v. *United States*, 744 F.2d 699, 701 (9th Cir. 1984) (publication of United States' claim in Federal Register triggered running of QTA's limitations period). Petitioner had no pending appeal at the time of the publication in the Federal Register; but even if he did, one who is involved in ongoing dealings with an agency surely should not be held to a lesser standard of notice than the world at large. Any other rule would completely undermine the Federal Register's function of furnishing official notice to citizens at large of the

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[7] Donnelly erroneously relies (88-533 Pet. 23-24) on a departmental notice to him dated May 12, 1961. That notice stated that Donnelly was not then required to reduce his application to cover only land outside the power-site withdrawal, because a survey was contemplated; but the notice expressly stated that it was "not to be construed as granting any rights or concessions to the withdrawn area" and that at the completion of the investigation, a new decision with an appropriate appeal period would be issued "calling for an application to enter on the lands not withdrawn" (Pet. App. 87a-88a). This notice, which was sent to Donnelly more than 12 years before he filed his QTA claim, thus made clear that the Department continued to reject any claim to lands that *were* withdrawn.

government's actions and decisions. Moreover even if Donnelly's argument regarding the Federal Register notice were sound, the judgment of the court of appeals would still be correct: as that court further held (Pet. App. 13a-14a), Donnelly already had personal notice sufficient to trigger the QTA's limitations period as of 1959, when BLM notified him for the second time that his homestead entry had been rejected.[8]

b. Petitioner Donnelly further contends (88-533 Pet. 9-11, 14-18) that even if his QTA claim against the United States was properly dismissed, his suit against respondent Eklutna should have been permitted to continue. In particular, Donnelly argues (*id.* at 9-11) that the court of appeals erroneously held that his quiet title suit against Eklutna is subject to and barred by the 12-year statute of limitations in the QTA. Donnelly mischaracterizes the basis of the decision below. The court of appeals did not hold that the 12-year statute of limitations that governs QTA suits against the United States is directly applicable to Donnelly's quiet title suit against Eklutna. Rather, relying on its prior decision in *Lee I*, the court simply held that the United States is an indispensable party to Donnelly's

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[8] Donnelly also contends (88-533 Pet. 12-13) that his claim seeking a patent from the United States should be governed by the statute of limitations in ANCSA (43 U.S.C. 1632(a)), which provides that a decision of the Secretary under ANCSA shall not be subject to judicial review unless such review is initiated within two years. In Donnelly's view, his claim is timely under Section 1632(a) because it was filed before the expiration of two years after the Secretary issued the patent to respondent Eklutna in 1979. However, as we explained in response to petitioner Lee's identical argument in *Lee I* (87-642 Br. in Opp. 9 n.5), Section 1632(a) was intended to *limit* claims; it was not intended to *revive* claims against the United States that were already barred by another statute (*e.g.*, the QTA) at the time the Secretary rendered the relevant decision under ANCSA.

quiet title suit against Eklutna but that the United States cannot be joined as a defendant because the QTA's statute of limitations bars Donnelly's claim against the United States (Pet. App. 14a-15a, quoting 809 F.2d at 1410-1411).

Donnelly does not even mention, much less rebut, the indispensable-party basis for the court of appeals' decision dismissing his quiet title claim against Eklutna. There accordingly is no reason for the Court to grant review of the court of appeals' judgment in that respect, especially since the Court has already denied review of that issue in *Lee I*. Moreover, as we explained in our brief in opposition in *Lee I* (87-642 Br. in Opp. 12-16), the indispensable-party holding in *Lee I* (and therefore in this case) is correct under Fed. R. Civ. P. 19. The United States plainly has an "interest" (within the meaning of Rule 19(a)) in Donnelly's suit against Eklutna, because if he were to succeed in this case and thereby deprive Eklutna of its title to the 97.5 acres, Eklutna would be entitled to receive other land from the United States to compensate for that diminution of its statutory entitlement. See 87-642 Br. in Opp. 13-14 & n.1. Because the United States therefore is a necessary party, but cannot be joined as a defendant in Donnelly's suit to establish his title because of the QTA's statute of limitations, it is necessary to determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable" (Fed. R. Civ. P. 19(b)).

A weighing of the four factors that are among those to be considered in making a determination under Rule 19(b) establishes that the dismissal in this case was proper. The potential prejudice to the United States is clear, because if Donnelly were to prevail in his suit against Eklutna, the United States would stand to lose its title to an equivalent amount of land. Nor can relief be shaped in a way that

would lessen the harm to the United States. The remaining two factors identified in Rule 19(b) might be thought to weigh in favor of allowing the suit to proceed, since the court presumably could enter an adequate judgment in the absence of the United States and Donnelly does not have an adequate remedy at the present time if his suit against Eklutna is dismissed. However, the latter factor is scarcely compelling, because Donnelly plainly did have an adequate remedy in the form of a suit against the United States under the QTA, but he voluntarily allowed the time for filing such a suit to expire. Moreover, Rule 19(b) in the end requires a court to rely on "equity and good conscience" in determining whether a suit should be dismissed because of the absence of a necessary party. Here, because petitioner's problems are of his own making, and because any judgment entered in favor of Donnelly against Eklutna would ultimately redound to the detriment of the United States, the court of appeals' conclusion that the United States is an indispensable party in the circumstances of this case is amply supported by "equity and good conscience." In any event, the question whether the United States is an indispensable party under the particular statutory and regulatory framework implementing the selection rights of Alaska Native corporations is not one of general importance that warrants review by this Court.[9]

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[9] Donnelly relies (88-533 Pet. 14-18) on a common-law theory of constructive trust in seeking to wrest title to the 97.5 acres from respondent Eklutna. However, as we explained in *Lee I* in response to petitioner Lee's reliance on the same constructive-trust theory and cases (see 87-642 Br. in Opp. 12), this argument ignores the particular factual circumstances and statutory framework of this case. Even if a federal common-law constructive-trust action against the patentee survived the enactment of ANCSA and the QTA, the United States would be an indispensable party to such an action because the United

2. Petitioner Donnelly and petitioner Lee both contend (88-533 Pet. 18-23; 88-549 Pet. 11-27) that even if they cannot succeed on their claim that they already have equitable title to the disputed parcels (on the theory that the Secretary was required to rescind the power-site withdrawal in the 1950s and immediately issue them homestead patents that included those parcels), respondent Eklutna is required to convey the title to the surface estate in those parcels to them under Section 14(c)(1) of ANCSA.[10] This effort by petitioners to avoid the consequences of their failure to press their homestead claims against the United States in a timely manner does not warrant this Court's attention.

a. Petitioners first appear to suggest (88-533 Pet. 20, 21-22; 88-549 Pet. 7, 20-21, 25) that the court of appeals held (i) that a plaintiff may not bring an action under Section 14(c)(1) of ANCSA to compel a Native village corporation to convey title to the surface estate unless the plaintiff also brings a quiet title action against the United States to establish that he already has title to the land; and (ii) that an action against the village corporation therefore

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States would be required to convey an additional amount of land to the Native corporation to compensate for any land that the corporation was found to hold in constructive trust for Donnelly. Moreover, both courts below held that under the rationale of *Milwaukee* v. *Illinois*, 451 U.S. 304, 313-319 (1981), a federal common-law constructive-trust action does not survive the enactment of ANCSA, because ANCSA occupies the field of disputed title to lands selected by Native corporations (Pet. App. 16a; *Lee I*, 629 F. Supp. at 728-729).

[10] Section 14(c)(1) provides that a Native village corporation to which a patent has been issued shall first convey to a Native or non-Native occupant the title to the surface estate that was occupied as of December 18, 1971, "as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry" (43 U.S.C. 1613(c)(1)).

will always be barred if an action against the United States with respect to the same land does not lie under the QTA. Petitioners are mistaken if they actually read the court of appeals' opinion in this manner, which would effectively render the United States an indispensable party to every suit under Section 14(c)(1).

We agree with petitioners that suits under Section 14(c)(1) are disputes that arise principally between the Native village corporation and the plaintiff asserting occupancy rights, since the village corporation's duty to convey title to the surface estate arises only after the United States has issued a patent to the corporation. We further agree that the United States is not an indispensable party to an ordinary suit under Section 14(c)(1), since if the plaintiff obtains title to the surface estate he actually occupies, the United States is not obligated to issue a patent to the Native corporation for an additional amount of land. In this respect, suits by third parties to obtain title to the surface estate in the first instance under Section 14(c)(1), based on past occupancy, differ from quiet-title and similar suits by third parties claiming that they *already* have title to the land and that the United States therefore could not convey title to the Native corporation in the first place.

Contrary to petitioners' apparent contention, however, the court of appeals did not hold otherwise in this case. The court did not dismiss petitioners' Section 14(c)(1) claims because of the absence of an indispensable party (the United States) that could not be sued. It instead rejected petitioners' Section 14(c)(1) claims *on the merits,* concluding that that Section does not afford amnesty relief to persons whose homestead claims were barred because the land for which they applied had been withdrawn for a special federal purpose and who therefore were tres-

passers on the unavailable land. Pet. App. 15a-16a. Petitioners sought to answer this reasoning by contending that they were not in fact trespassers because they had equitable title to the land, on the theory (which the court of appeals had already found to be barred) that the Secretary was required to revoke the power-site withdrawal in the 1950s and patent the parcels to petitioners under the homestead laws (*id.* at 16a). It was only in response to that claim by petitioners of preexisting *title*, rather than merely past occupancy, that the court of appeals then discussed petitioners' inability to establish title to the parcels because the QTA's 12-year statute of limitations bars a quiet title action against the United States (*ibid.*). The court did not suggest that the ability to bring a timely quiet-title suit against the United States is a prerequisite to Section 14(c)(1) suits generally. This reading of the opinion below is confirmed by the Ninth Circuit's subsequent decision in *Buettner* v. *Kavilco, Inc.*, No. 87-4435 (Oct. 26, 1988), in which it decided the merits of a claim under Section 14(c)(1) without any suggestion that the absence of the United States as a party presented a jurisdictional or procedural defect. The Supreme Court of Alaska likewise has decided a Section 14(c)(1) claim on the merits without any suggestion that the absence of the United States presented an obstacle to its doing so. *Hakala* v. *Axtam Corp.*, 753 P.2d 1144 (1988). Accordingly, the decision below does not warrant review on any question involving the status of the United States as an indispensable party under Section 14(c)(1).

b. Nor does the court of appeals' rejection of petitioners' Section 14(c)(1) claims on the merits warrant review by this Court. Because suits under Section 14(c)(1) are principally between the plaintiff and the Native village corporation and do not directly involve the United States,

the United States did not take a position in the court of appeals on the merits of petitioners' claims under Section 14(c)(1), and we do not take a definitive position on the scope of that Section here. However, whatever may be the application of Section 14(c)(1) to other persons who might be termed "trespassers" on federal lands, the circumstances of this case do lend particularlized support to the court of appeals' rejection of petitioners' claims and serve to distinguish those claims from others that have arisen or may arise under Section 14(c)(1).

This case involves land that had long been withdrawn from entry under the public land laws at the time it was patented to respondent Eklutna in 1979, and petitioners had been repeatedly informed, beginning more than 20 years earlier, that they had no rights in the land and were trespassers on it. In fact, the United States brought a trespass action against petitioner Donnelly in 1975, four years before the land was patented to Eklutna. As a result, petitioners did not have the sort of expectation of continued possession that Section 14(c)(1) was intended to protect. Indeed, petitioners were specifically informed when their homestead applications were denied in the late 1950s that if the power-site withdrawal were subsequently revoked, as petitioners urged, they would not necessarily receive a homestead patent to the land they sought within the withdrawal area, because other persons—the State of Alaska and veterans—would have preference rights to select the same land. See page 4, *supra*. The effect of the court of appeals' interpretation of Section 14(c)(1) in this case is simply to recognize an additional person (respondent Eklutna) who also was given a preference right to select the land. Accordingly, the Section 14(c)(1) claims in this case are quite different from those that might be advanced in other cases by persons who built a home or

engaged in business on land in the public domain that had not been withdrawn for a special federal purpose.

Moreover, even if the court of appeals erred in concluding that Section 14(c)(1) is wholly inapplicable to land within a power-site withdrawal, it does not follow that Section 14(c)(1) would support a claim to more than the land on which a residence or place of business was actually built, as well as the immediately adjacent area (the curtilage). Compare *Buettner* v. *Kavilco, supra* (involving "lots" on which homes had been built); *Halaka* v. *Axtam Corp., supra* (holding that only the business site and the surrounding curtilage were covered by Section 14(c)(1)). In particular, there is substantial reason to doubt that Section 14(c)(1) was intended to afford a basis for obtaining title to the surface estate in an entire 160-acre homestead claim (or the 97.5-acre and 65-acre portions of such a claim that petitioners seek in this case), which would encompass far more than the residence or business and the curtilage.[11] In fact, petitioner Lee, in response to a notice of trespass served by the government, removed his improvements from the parcel within the withdrawal area in November 1971 (Pet. App. 39a-40a). He therefore did not even have a residence or business on the land he claims to

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[11] These factors may distinguish the claims of most if not all of the 59 individuals who have filed a brief as amici curiae in this case. That brief does not disclose how many (if any) such claims involve land that was withdrawn for a special federal purpose. Moreover, the motion accompanying the brief states (mot. at 3) that most of the individuals are operators of commercial fishing sites, which presumably would involve claims that are far more modest than those advanced by petitioners here. Indeed, amici concede (mot. at 4) that "[t]he interests of the fifty-nine 14(c) Claimants differ from that of Petitioners, in that *Donnelly/Lee* were principally interested in obtaining broader relief in the courts below under the Homestead Act in order to receive title to more acreage than would be the case under ANCSA 14(c)."

have "occupied" on December 18, 1971, the relevant date under Section 14(c)(1) of ANCSA.[12]

In any event, the decision of the Ninth Circuit regarding the application of Section 14(c)(1) in the circumstances of this case does not conflict with the decision of any other court of appeals, since such claims to land in Alaska under ANCSA cannot arise in other federal circuits. Significantly, moreover, the only other case decided by the Ninth Circuit under Section 14(c)(1) involved persons who lawfully occupied the land in question under permits issued by the Forest Service (*Kavilco,* slip op. 13399), and the Ninth Circuit sustained their claims. Nor, contrary to petitioners' contention (88-533 Pet. 9; 88-549 Pet. 21), does the court of appeals' application of Section 14(c)(1) conflict with the decision of the Alaska Supreme Court in *Halaka.* The Alaska Supreme Court there construed the phrase "primary place of business" in Section 14(c)(1); it did not consider whether trespassers generally, or trespassers on withdrawn lands in particular, are eligible to receive title to the land under Section 14(c)(1). To the contrary, the court in *Halaka* described Section 14(c)(1) as affording protection to persons "who had previously utilized the lands in an established, *legal* and routine fashion" (753 P.2d at 1147 (emphasis added)). Finally, as noted above, neither *Kavilco* nor *Halaka* supports petitioners' invocation of Section 14(c)(1) to obtain title to their entire homestead claims, rather than to only the land under and immediately surrounding a residence or business establishment.

For the foregoing reasons, and because petitioners' homestead claims are not typical of those arising under Section 14(c)(1), review by this Court is not warranted.

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[12] Petitioner Donnelly, on the other hand, defied the notice of trespass and retained a residence within the withdrawn area on December 18, 1971 (Pet. App. 40a).

CONCLUSON

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
EDWARD J. SHAWAKER
VICKI L. PLAUT
Attorneys

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No. 88-549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR AND DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,

Respondents.

JAMES W. LEE,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

STEVEN P. OLIVER
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

Petitioners Therese U. Donnelly and James W. Lee reply briefly to the oppositions to their petitions for writs of *certiorari*. Petitioners emphasize respondents' misreading of the opinion below. It is reasonable to conclude that, if the government had read the opinion below as petitioners and *amici* read it, then the government would have responded differently to the petitions. The government's response demonstrates, at a minimum, that the opinion below may be susceptible to different readings which this Court should clarify by review. The lower courts which administer ANCSA will ultimately have to struggle with these different interpretations if this Court were to forego this opportunity of clarifying the meaning of ANCSA and other legal issues raised below.

1. Contrary to the government's statement (government Opposition at page ___), the previous proceedings in *Lee v. United States et al*, 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee v. Eklutna et al*, 56 U.S.L.W. 3498 (1988) did *not* address the effect of the Alaska Native Claims Settlement Act ("ANCSA") on the constructive trust remedial doctrine of this Court.

2. Contrary to the government representation (Opposition, page ___), Donnelly's petition *did* raise and address the purported "indispensable party" issue.

> Under no theory is the United States a party to a Section 14(g) claim. It claims no interest in the land; no federal interest is in dispute. *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114, 119 (1968).

> That the United States issued the patent does not make it a party. *Daniels v. Wagner*, 237 U.S. 547, 567 (1915).

Donnelly petition, pp. 9-10. See also *Lee* petition at pp. 20-21. The Court of Appeals itself said Donnelly's constructive trust claim was pre-empted by ANCSA, not that the United States was an indispensable party to her non-Quiet Title Act constructive trust claim against Eklutna. Amended Opinion, App. p. 16a.

The United States' presence as a party is not required under a trust theory. Congress made clear that ANCSA created no trust relationship. House Report 92-523, 1972 U.S. Code Cong. & Ad. News, page 2199; Conference Report No. 92-746, page 2253; *United States v. Atlantic Richfield*, 435 F.Supp. 1009, 1018 (D.Alaska 1977), aff'd 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980). Respondents' reliance on *Nichols v. Tyvasy*, 809 F.2d 1317 (8th Cir. 1987) is therefore misplaced.

3. Contrary to the government's assertion (Opposition, page ___), the Court of Appeals did *not* deny petitioners' Section 14(c)(1) claim on the merits. That court specifically denied their Section 14(c)(1) claim on the theory that the United States was an indispensable party which could not be joined. The Court of Appeals stated:

> Put another way, appellants' Section 14(c)(1) claims are, again, based on their title claim, which *cannot be resolved* in any action to which the United States is not a party. Accordingly, the Section 14(c)(1) claims are also barred by the QTA statute of limitations.

Amended Opinion, Donnelly Appendix 16a. Emphasis supplied. The opinion below, moreover, sets forth no facts which could support a decision on the merits.

Respondents appear to argue that the *Buettner v. Kavilco*, (9th Cir. No. 87-4435, Oct. 26, 1988) opinion shows that the United States is not an indispensable party to a Section 14(c)(1) claim. However, that is exactly what petitioners are contending. For this and other reasons demonstrated by petitioners, the decision below should be reversed.

Nowhere do respondents address the effect of ANCSA Section 26 (uncodified), discussed in Donnelly's petition at 21. ANCSA Section 26 cannot be reconciled with the Ninth Circuit Court of Appeals' explicit ruling that Section 14(c) claims depend on the pre-ANCSA status of the land, and respondents have not addressed this difficulty.

4. The government misconceives the significance of the *Donnelly* and *Hakala* decisions. *Hakala and Kitchen v. Atxam*, 753 P.2d 1144 (Alaska 1988). The government argues that *Donnelly* reaches only a narrow result, but the broad language employed in the opinion below will impact all land occupants in Alaska, whether the appeals court intended such result or not. *Donnelly* appears to direct a district court to dismiss any occupancy claim as to which the claimant cannot quiet his title against the United States. The state court interpretation, *Hakala*, conflicts with the *Donnelly* decision because the *Hakala* plaintiffs demonstrated no pre-existing right of occupancy, as *Donnelly* commands. The Ninth Circuit Court of Appeals acknolwedge, App. A, p. 16a, n.9, that the decision below conflicts with *Hakala*, and respondents have not addressed this fact.

5. Respondents argue that 28 U.S.C. Section 2409a(g) was triggered by the United States telling Donnelly that the United States claimed some land in the Eagle River Valley to be reserved. Until the government particularized its claim and stated what land inside Donnelly's claim was reserved, however, Donnelly could not draw a complaint that meets the requisites of a Quite Title Act complaint: "The complaint shall set forth *with particularity* . . . the right, title, of interest claimed by the United States." 28 U.S.C. Section 2409a(d). Until Donnelly knew that the boundary of the alleged reserve actually conflicted with his homestead tract, he could not meet this requirement. The QTA limitations period did not begin, therefore, until the United States in 1964 issued its final decision and declared to him the alleged boundary location. The appeals court itself was of the view that an actionable claim did not arise until completion of the administrative process. Amended Opinion, App. A, p. 12a. The error below was that court's disregard of the contents of the administrative record showing a continuous administrative proceeding which ended in 1964, not in 1961. Appendices F, G and H.

As to the sufficiency of notice in the Federal Register, it is fundamental due process jurisprudence that notice by publication is not sufficient where personal notice can be given. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340, 1344, 1346 (1988).

In conclusion, petitioners submit that this Court should not be diverted by respondents' misreading of the decision below. They respectfully request the

Court to issue a writ of *certiorari* to address the issues raised by the decision below.

Dated at Anchorage, Alaska this 13th day of January, 1989.

STEVEN P. OLIVER
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Attorney for Therese U. Donnelly
and James W. Lee